SUPREME COURT, U.S.
FILED

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

CHARLOTTE A. HAMANN,

Petitioner

v.

BIO-RAD LABORATORIES, INC.,

a Delaware Corporation,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Charlotte Hamann
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114 pp

QUESTIONS PRESENTED

I

Is it permissible for the District Court, acting pursuant to its inherent authority, to sanction prelitigation conduct which is not the subject of any complaint, civil or criminal? *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 74 (1991) (KENNEDY, J., dissenting).

II

Is it permissible for the District Court, acting pursuant to the Federal Rules of Civil Procedure, Rule 26(c), to order seizure and turnover of information acquired independent of the court's discovery process, two years before litigation commenced? *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984).

III

Do our First Amendment and Fourth Amendment freedoms comprehend the right to acquire information independent of the court's process and to possess and use that information in a subsequent civil lawsuit despite the District Court's assessment that the information was "improperly" or "wrongfully" acquired?

RULE 14(b) STATEMENT, PARTIES

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit are all shown in the caption.

Respondent Bio-Rad Laboratories, Inc. is a publicly held company.

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"As in this case, such a [Rule 26(c)] protective order prevents a party from disseminating only that information obtained through the use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's process." 16

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IN THE SUPREME COURT
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CHARLOTTE A. HAMANN
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BIO-RAD LABORATORIES, INC.,
a Delaware Corporation

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Charlotte Hamann respectfully petitions for a writ of certiorari to review the judgment and orders of the United States Court of Appeals for the Ninth Circuit and the underlying judgment and orders of the District Court.

OPINIONS BELOW

I. ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

The Order denying the petition for writ relief was filed October 24, 1997, and is reprinted at App. 5a.

The Order denying the petition for writ relief was filed April 10, 1998, and is reprinted at App. 16a.

The Memorandum Decision affirming the judgment of the District Court was filed May 13, 1999, and is unreported. It is reprinted at App. 18a.

II. ORDERS OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA:

The Order re: Confidential Information and Return of Personnel Files was entered September 3, 1997. It is reprinted at App. 1a and is unreported.

The Order Conditionally Granting Defendant's Motion to Dismiss for Violation of Court Order was entered February 4, 1998. It is reprinted at App. 6a and is unreported.

The Order Dismissing Action was entered March 18, 1998. It is reprinted at App. 13a and is unreported.

The Judgment was entered March 18, 1998. It is reprinted at App. 15a and is unreported.

JURISDICTION

The Memorandum Decision of the United States Court of Appeals for the Ninth Circuit was filed May 13, 1999. A petition for rehearing was filed on May 17, 1999, and denied on July 26, 1999. The Court's certiorari jurisdiction arises under 28 U.S.C., § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

ARTICLE III, SECTION 1, U. S. CONST.

In pertinent part:

"The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. ..."

ARTICLE III, SECTION 2, U. S. CONST.

In pertinent part:

"The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ..."

FIRST AMENDMENT, U. S. CONST.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

FOURTH AMENDMENT, U. S. CONST.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

RULE 26(c), FED. RULES OF CIV. PROC.

The text of paragraph (c) of Rule 26 is set forth in the Appendix at 22a.

RULE 82, FED. RULES OF CIV. PROC.

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C., §§ 1391-93.

STATEMENT OF THE CASE

The Court must look below the judgments of both the United States Court of Appeals for the Ninth Circuit and the United States District Court to the core information seizure order, ¶¶ 11&12 of the District Court's Order re: Confidential Information and Return of Personnel Files:

¶¶ 11 & 12, Order re Confidential Information and Return of Personnel Files [August 29, 1997]:

> "11. The Court finds that the third party personnel files which plaintiff concedes were taken by her from the files of defendant Bio-Rad, are the property of defendant and contain confidential information. Accordingly, plaintiff is ordered to return to defendant all copies of third party personnel files no later than September 5, 1997. See Conn v. Superior Court, 196 Cal.App.3d 774, 781 (1987) ("regardless of whether some of the documents may be ultimately discoverable, defendants have, and have always had, the right to keep their own documents until met with proper discovery requests or ordered to disclose them by the Court."); see also In re IBP Confidential Business Documents Litig., 754 F.2d 787 (8th Cir. 1985); Furnish v. Merlo, 128 Lab.Cas. (CCH) ¶57,755 (D.Or. Aug. 29, 1994).
>
> 12. Plaintiff shall deliver to this Court any documents summarizing, quoting from or otherwise recording information concerning the

> nature or contents of these confidential files. Plaintiff shall also submit to the Court a declaration, signed under penalty of perjury, that she has retained no copies of the third party personnel files."

(See App. 1a-4a for the entire order.)

It isn't immediately apparent from the face of this order that the respondent retained the original personnel files, that the petitioner made photocopies of the personnel files at her own expense, on her own time, or that the photocopies were lawfully acquired.

The Memorandum Decision of the United States Court of Appeals for the Ninth Circuit recharacterized the photocopies as "stolen files." (App. 19a) The respondent has never pleaded or proven the elements of a claim for conversion. There are no pleaded counterclaims for acquisition, possession or use of information.

The petitioner asserts that, because there has never been a pleaded claim for wrongful acquisition, possession or use of the information ordered seized, the District Court did not have Article III, Section 2, jurisdiction of the acquisition, possession or use of the information. There was no "Case" for seizure.

The petitioner further asserts that neither Article III, Section 1, nor Article III, Section 2, of the Constitution confer on the District Court the inherent authority to sanction the

acquisition, possession or use of the information ordered seized.

The petitioner further asserts that Rule 26(c) of the Federal Rules of Civil Procedure did not authorize the District Court to issue the seizure order to control the possession and use of the information.

The petitioner further asserts that the information seizure order is prohibited by the First Amendment and the Fourth Amendment to the Constitution.

FACTS

The personnel records had been photocopied by petitioner Charlotte Hamann on the evening of June 20, 1994, more than two years before the complaint was filed in District Court. The respondent, Bio-Rad Laboratories, Inc. ("the Company,") retained the originals. The two hundred sixty six photocopies were made at Hamann's expense and on her own time. She had ready access to the originals. The originals had been abandoned in a file cabinet in a vacant house trailer at the Company's chemical plant, where Hamann worked as a chemical engineer. Hamann had worked for the Company since 1987.

The photocopies were lawfully obtained. No criminal or civil complaint has ever alleged otherwise. The photocopied personnel records contain job titles, pay grades, performance evaluations, and not much else.

The photocopies were voluntarily disclosed by Hamann in April 1997, pursuant to Rule 26(a) of the Federal Rules of Civil Procedure, at the same time the Company voluntarily disclosed fabricated documents. Prior to this disclosure, the Company had no knowledge that Hamann had photocopied the personnel records. Prior to the disclosure, no one except Hamann had seen the photocopies.

The particulars of the employment dispute are not relevant to this petition.[1] What is relevant, is the reason Hamann photocopied the personnel records.

In April, 1994, Hamann informed the Company that she intended to leave the Company's employ because she hadn't been promoted to "Senior Engineer" and was five years overdue for that promotion. Her immediate managers pleaded with her not to leave. In a written performance evaluation, her managers stated that Hamann should be promoted to the position of Senior Engineer. Three days later the Company made an offer in writing. However, there was fraud in the offer. Highest level managers were unwilling to give a woman the title of Senior Engineer. They contended that the title didn't exist and hadn't existed since 1991. Within days of that misrepresentation, the availability of a Senior Engineer position was posted company wide. Despite the job posting, highest level management continued to represent that the position had been eliminated in 1991.

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1 Particulars may be found in the First Amended Complaint at App. 30a and the Answer to the First Amended Complaint at App. 51a.

Informal efforts to resolve the fraud were unsuccessful. Hamann retained counsel and for six weeks attempted to reach settlement with the Company. Her attorney communicated directly with the Company's General Counsel and highest level management. Hamann's demands were minimal: that the Company would promote her to the Senior Engineer position and pay her attorney's fees of approximately $2,500. The title and recognition of Senior Engineer status meant a lot to her and has considerable recognition and value within the engineering profession. The recognition and status was long overdue compensation. It had been earned five years earlier.

Highest level management stonewalled. Settlement negotiations reached an absolute impasse. Hamann knew that the personnel records would show that the Senior Engineer position existed and thought documentary proof of the existence of the Senior Engineer position could force settlement. On the evening of June 20, 1994, she photocopied the personnel records. She took the records off site and copied them at her own expense. Early the next morning, before she could do anything with the photocopies, her immediate managers told her that she had to leave the Company the following day. Her managers had been under intense pressure from highest level management. No one knew that Hamann had made the photocopies.

Hamann's complaint against the Company was filed in United States District Court on July 29, 1996. During initial discovery in the second quarter of 1997, the Company produced fabricated personnel records, including bogus organizational charts and database entries. There was

evidence of pay grade and job title fraud. There was evidence the Company had represented to the Equal Employment Opportunity Commission that Hamann wasn't an engineer in 1994 and had in other ways misled the EEOC. In addition, there was evidence suggesting the Company had provided false information to the Office of Federal Contract Compliance Programs in 1995, and had pilfered that *original* 1995 OFCCP file following Hamann's Freedom of Information Act request to the agency in 1997.

Hamann also discovered that one of the Company's in-house attorneys was practicing law while he was repeatedly suspended from practice for acts of moral turpitude, dishonesty and corruption. The suspended attorney had worked on her case. Hamann alerted the District Court in filed motion papers and notified the California State Bar Association. Within six months, papers filed in state court which showed that the suspended attorney had been practicing law, disappeared from the state court files.

It was within this factual context that the District Court ordered seizure and turnover to the Company of all of the photocopies Hamann had made in 1994. The Company requested seizure pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and the court's inherent authority.

From the beginning, the petitioner recognized the constitutional dimensions of the information seizure order and raised, in the papers and on the record, the Article III, Section 2, and First Amendment prohibitions to enforcement of the order. (App. 24a, R.T. 10/31/97 and 1/23/98) The Fourth

Amendment prohibition was raised for the first time in the Court of Appeals.

As required by this Court's opinions, the petitioner twice sought and obtained stays of the information seizure order in District Court and twice sought writ relief from the Court of Appeals. The purpose of seeking the District Court stays was to remain in compliance with the court's process while relief was sought from the Court of Appeals. Writ relief was twice denied. (App. 5a, 16a)

Petitioner has repeatedly acknowledged that she understands the gravity of her decision to willfully disobey the order but has explained that the Court of Appeals' denial of writ review left her with no other reasonable choice. Unable to obtain writ relief, she was forced to disobey the order to obtain standing to appeal. (App. 26a) She has repeatedly explained that the District Court's order usurps core constitutional rights, furthers corruption, and is dangerous to democracy. The order must be challenged.

The District Court entered Judgment on March 18, 1998. Hamann filed her notice of appeal from the Judgment on March 19, 1998. Her second writ petition was still pending when she filed her notice of appeal. Her second petition for writ was summarily denied on April 10, 1998.

The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court on May 13, 1999. On May 17, 1999, the petitioner filed her request for rehearing. Rehearing was denied on July 26, 1999.

REASONS FOR GRANTING THE WRIT

The questions presented by this petition will only reach the Court by way of disobedience of a void court order.

The petitioner has adhered to the procedure dictated by this Court and the United States Court of Appeals for the First Circuit for challenging the clearly improper exercise of judicial authority. *Walker v. City of Birmingham,* 388 U.S. 307, 318 (1967); *In the Matter of Providence Journal Co.,* 820 F.2d 1354 (1st Cir. 1987) (holding en banc.) The petitioner twice sought stays of the order from the District Court while she sought writ relief. Writ relief was twice denied by the United States Court of Appeals for the Ninth Circuit.

The challenged improper, information seizure order is a First Amendment prior restraint and a Fourth Amendment prohibited papers seizure. The collateral bar rule cannot shield it from the Court's scrutiny.

A. CERTIORARI SHOULD BE GRANTED TO DECIDE THE IMPORTANT ARTICLE III QUESTION WHICH PROVOKED JUSTICE KENNEDY'S POWERFUL AND COMPELLING DISSENT IN *CHAMBERS v. NASCO, INC.*, 501 U.S. 32 AT 74 (1991):

> "Despite the Court's equivocation on the subject, *ante*, at 2138, n. 16, it is impermissible to allow a District Court acting pursuant to its inherent authority to sanction such prelitigation primary conduct. A court's inherent authority extends only

to remedy abuses of the judicial process."

(Joined by Chief Justice Rehnquist and Justice Souter. Agreement by Justice Scalia.)

In this case, the respondent moved for the information seizure order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure or, in the alternative, the court's inherent authority and cited *Chambers v. Nasco, Inc.* The respondent has never pleaded the primary conduct underlying the seizure order and the conduct is likely not actionable. The Court of Appeals and the District Court remained steadfastly oblivious to the necessity of standing, pleading and legal proof through three hearings, two writ petitions and an appeal. The District Court simply disapproved of the petitioner's primary conduct and sanctioned it. The Court of Appeals generally affirmed on the authority of the Federal Rules of Civil Procedure by citation to a discovery case. It then juiced up its decision by recharacterizing the photocopies as "stolen files." (App. 19a) Merely making photocopies doesn't "convert" files. *FMC Corp. v. Capital Cities/ABC, Inc.*, 915 F.2d 300, 306 (7th Cir. 1990). The photocopies were made at the petitioner's expense on her own time.

Fundamentally, the District Court never had subject matter jurisdiction of the acquisition, possession or use of the information. The Federal Rules of Civil Procedure provide the normal course for beginning, conducting, and determining an Article III, Section 2, "Case." There was a "case" before the District Court, but it wasn't for wrongful acquisition, possession or use of information. Therefore, there was no

Case within the meaning of Article III which would authorize the issuance of the information seizure order. The Rules do not permit the adjudication of unpleaded claims by summary proceeding. *New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404, 406 (1960).

The District Court rationalized that "The Court has a strong interest in ensuring that parties operate within the confines of the law rather than resorting to 'self-help' tactics." (App. 10a) Notwithstanding the District Court's interest, the District Court has no standing to assert hypothetical claims, or any claims. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998).

The District Court further asserted that it was relying on Cal. Lab. Code § 2860.[2] Again, the respondent has never pleaded a Cal. Lab. Code § 2860 claim. Moreover, California courts have rejected the District Court's overreaching interpretation of Cal. Lab. Code § 2860. The statute is limited to trade secrets and business information which has intrinsic monetary value. *See KGB, Inc. v. Giannoulas*, 104 Cal.App.3d 844 at 855 (1980) (statute cannot abridge First Amendment protected conduct).

The District Court is not permitted to extend its Article

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[2] Cal. Labor Code § 2860 provides that "Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment."

III jurisdiction with the Federal Rules of Civil Procedure. Fed. Rules Civ. Proc., Rule 82.

So the irreducible question is, does the District Court have the inherent authority to sanction the prelitigation primary conduct under Article III, Section 1 or Section 2? Does the District Court have the inherent authority to retroactively or prospectively regulate prelitigation information acquisition as part of the court's process? Unlike *Chambers v. NASCO, Inc.*, the information seizure sanction is founded only on prelitigation primary conduct, the information acquisition, and the dismissal sanction is based only on the willful disobedience of the single order for information seizure.

Petitioner submits that Justice Kennedy is right. The District Court does not have the inherent authority to sanction prelitigation primary conduct. This conclusion is compelled because the alternative conclusion is that the courts have no jurisdictional limits. The alternative conclusion would permit the courts to be in the middle of all of our disputes at any time. This alternative finds no support in the Constitution or in the American people. The Court of Appeals' conclusion that "Hamann's discovery requests brought the issue of stolen files within the province of the Court's powers to regulate discovery" (App. 19a) is Article III error.

Clearly, the United States Court of Appeals and the District Court have so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power.

B. CERTIORARI SHOULD BE GRANTED TO DECIDE THE IMPORTANT FIRST AMENDMENT AND FEDERAL RULES QUESTION WHICH WAS ANSWERED ONLY IN DICTUM IN *SEATTLE TIMES CO. v. RHINEHART*, 467 U.S. 20 AT 34 (1984):

> "As in this case, such a [Rule 26(c)] protective order prevents a party from disseminating only that information obtained through the use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's process."

The Court of Appeals concluded, contrary to the foregoing dictum, that a discovery request for personnel records brought the possession of photocopies of similar records, obtained independent of the court's process, under the District Court's power to regulate discovery. (App. 19a)

There appear to be only three apposite opinions of the Court of Appeals. Two are Second Circuit opinions and one is a Ninth Circuit opinion. Given that disobedience of a court order may be necessary to compel review of the question, the paucity of opinions is expected.

The Second Circuit opinions both held that the District Court has no power under the discovery rules to prohibit the dissemination of information acquired independent of the

judicial process and that such orders are prior restraints prohibited by the First Amendment. *Bridge C.A.T. Scan Associates v. Technicare Corp.*, 710 F.2d 940, 946 (2nd Cir. 1983) (noting at 946 that there was no pleaded counterclaim for misappropriation of information) and *International Products Corp. v. Koons*, 325 F.2d 403, 408 (2nd Cir. 1963).

The Ninth Circuit opinion did not reach the First Amendment question and the Rule 26(c) question came to the Court of Appeals by the usual appeal process. The Ninth Circuit held that the District Court's power to control discovery does not extend to material discovered in a separate action. *Kirschner v. Uniden Corp. of America*, 842 F.2d 1074, 1081 (9th Cir. 1988).

The apposite decisions of the District Courts are split. Two are consistent with the Court's *Seattle Times Co. v. Rhinehart* dictum, *ante*, and correctly acknowledged the limits of the court's inherent power: *Culinary Food, Inc. v. Raychem Corp.*, 153 F.R.D. 614, 615 (N.D. Ill. 1994) and *Schlaifer Nance & Co. v. Estate of Warhol*, 742 F. Supp. 165, 168 (S.D.N.Y. 1990).

Two District Court decisions disregarded the *Seattle Times Co. v. Rhinehart* dictum, took no notice of the First Amendment question, and relied on the Court's inherent power to sanction protected First Amendment speech and conduct: *Fayemi v. Hambrecht and Quist, Inc.*, 174 F.R.D. 319, 324 (S.D.N.Y. 1997) and *In re Shell Oil Refinery*, 143 F.R.D. 105, 109 (E.D. La. 1992).

The tobacco litigation, which has generated similar Rule 26(c) motions for protective orders and document seizure of "wrongfully" acquired papers, should have put this First Amendment question on the Court's steps. However, the Rule 26(c) motions were typically ruled moot because the tobacco papers had already been downloaded to the Internet to evade threatened court ordered suppression and seizure of the information. *See Castano v. American Tobacco Co.*, 896 F.Supp. 590 (E.D. La. 1995).

Is the District Court's information seizure order prohibited by the First Amendment? Compliance with the order for seizure and turnover of the photocopies to the respondent would make it impossible for the petitioner to communicate the information on the photocopies, in or out of court.

Is the District Court's dismissal order a prohibited prior restraint or a prohibited punishment for exercising protected rights? The District Court makes it clear that the purpose of the information seizure order and the dismissal order is to chill the acquisition of information. The District Court assessed that "self-help" is bad, that the documents were "wrongfully obtained," and that the information acquisition was "misconduct." The Court of Appeals opined the files were "stolen" by the mere act of photocopying. These arguably poorly considered equitable assessments were permitted to trump the petitioner's five lawful claims and proof of nascent allegations of criminal conduct by the respondent.

In civil litigation and the prosecution of white collar

crime, the document is the smoking gun. The people most likely to have lawful access to that smoking gun, and recognize it for what it is, are insiders and employees. A judicially created rule prohibiting an insider or employee from acquiring, possessing and using evidence of wrongdoing, unless a judge preapproves that acquisition, functions as a chilling prior restraint. Such a rule presumes that the words "Congress shall make no law..." left a judicial window for equitable restraint of our First Amendment rights. There is no window for equity. These are legal rights.

The seizure order and the dismissal order are sanctions for exercising First Amendment rights before litigation. Both orders are intended to limit access to the court according to whether the court approves of this protected primary prelitigation conduct. The orders violate both the speech clause and the petition clause.

The District Court's seizure order and dismissal order rely on two published state court cases, *Pillsbury, Madison & Sutro v. Schectman*, 55 Cal.App.4th 1279 at 1286 (1997) and *Conn v. Superior Court*, 196 Cal.App.3d 774 at 781 (1987), which held that all of the information acquired before litigation commences, and subsequently used for litigation, must be acquired pursuant to discovery statutes, with the court's process, or with the consent of the defendant. The District Court's orders and the California cases are First Amendment prohibited prior restraints of our right of freedom of speech and our right to petition the government for redress of

grievances.[3] If a law is violated during the course of acquiring information, the remedy is a lawsuit for damages, not a prior restraint or a claim in equity. The court may not derogate First Amendment rights to equitable interests.

The First Amendment speech clause protects our right to acquire, possess and express all sorts of information in many different ways. *Griswold v. Connecticut*, 381 U.S. 479

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[3] The *Pillsbury, Madison & Sutro v. Schectman*, 55 Cal.App.4th 1279 (1997) holding at 1288-1289 is a particularly broad, overreaching prior restraint: "[The California] Discovery Act as amended and interpreted has subsumed the entire field pertaining to the gathering of evidence in preparation for trial. ...

[W]e will state clearly our agreement with those courts which have refused to permit 'self-help' discovery which is otherwise violative of ownership or privacy interests and unjustified by any exception to the jurisdiction of the courts to administer the orderly resolution of disputes. Any litigant or *potential* litigant who converts, interdicts, or otherwise purloins documents in the pursuit of litigation *outside the legal process* does so without the general protections afforded by the laws of discovery and risks being found to have violated protected rights. The least sanction cognizable in these circumstances would appear to be the one chosen by the trial court here: the return to the status quo existing at the time the documents were taken." (*Emphasis added.*)

The First Amendment objection to this state court holding was raised in the initial opposition papers to respondent's motion for a protective order. The opposition is included in the Excerpts of Record filed in the United States Court of Appeals for the Ninth Circuit.

(1955) (state may not contract the available spectrum of knowledge); *Reno v. American Civil Liberties Union* 521 U.S. 844 (1997) (federal statute proscribing transmission of indecent messages or patently offensive display abridges freedom of speech). The District Court may not require prior court approval for speech outside the court's process. The presumption of unconstitutionality of such a prior restraint is supposed to be virtually insurmountable. *In the Matter of Providence Journal Co.*, 820 F.2d 1342, 1348 (1st Cir. 1986) (right to privacy is insufficient basis for issuing prior restraint at 1350); *Goldblum v. National Broadcasting Corp.*, 584 F.2d 904 (9th Cir. 1978) (order requiring network to produce film for preview void as unconstitutional prior restraint of speech).

The petitioner requested and was denied judicial notice (App. 19a) of ABA Ethics Opinion No. 94-382 in the Court of Appeals. (App. 68a) This ethics opinion reflects one side of the controversy over the tobacco papers litigation and completely ignores the First Amendment implications of information acquisition and use. The three United States Court of Appeals cases and the two District Court decisions which correctly acknowledge the Court's *Seattle Times Co. v. Rhinehart* First Amendment dictum at 34, *ante*, are not cited at all by this ABA ethics opinion. Instead, it cites the two District Court decisions, *ante*, which fail to acknowledge the *Seattle Times Co. v. Rhinehart* dictum at 34. Shouldn't our lawyers be cognizant of and zealously defend our First Amendment rights?

The Court should grant certiorari because the United

States Court of Appeals for Ninth Circuit has decided that the District Court may seize and control the use of information not acquired with the court's process, despite this Court's dictum in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 at 34 (1984). The question of whether the District Court may impose a Rule 26(c) protective order to seize or control the use of information acquired independent of the court's process has not previously been decided by the Court and should be decided.

C. CERTIORARI SHOULD BE GRANTED BECAUSE THE SOCIETAL COSTS OF THE INFORMATION SEIZURE ORDER ARE TOO HIGH. THE INFORMATION FALLS SQUARELY WITHIN THE PROTECTION OF THE FOURTH AMENDMENT AND MAY NOT BE SEIZED WITHOUT PROBABLE CAUSE.

The petitioner first invoked the Fourth Amendment in the Court of Appeals. Since she had twice petitioned for writ and had twice been denied writ relief, she asked the Court of Appeals to treat her appeal as a petition for writ as to all those issues which may only be reached by writ.

The petitioner invoked the Fourth Amendment to prevent the District Court from seizing and returning to the respondent evidence of the respondent's alleged unlawful civil conduct and potential proof of criminal offenses. The petitioner has accused respondent of fabricating evidence for litigation purposes and of intentionally misleading federal agencies. The Fourth Amendment is more than a privacy amendment. It

discourages government corruption and the improper exercise of government power, including judicial power. It was properly invoked in this case to prohibit the court from improperly seizing information.

There was no probable cause for seizure. There is no indictment or counterclaim for the wrongful acquisition, possession or use of the information. The order does nothing to protect "the interests of employees who are third parties to the litigation." (App. 11a) The petitioner has already seen the personnel records. There was no misuse of the information. The information is discoverable. Respondent retained the original records. There was good reason for the petitioner to photocopy the records. Respondent was misrepresenting the existence of the Senior Engineer position to cheat her out of part of her compensation, the recognition of senior engineer status.

The District Court's information seizure order and the cited California opinions, which also ordered documents seizure, function as judicially created evidence exclusion rules. However, neither this Court nor the California Supreme Court has permitted the exclusion of evidence from a civil case because the evidence was "wrongfully" acquired by an individual before litigation. *See United States v. Janis*, 428 U.S. 433, 454 (1976) and *Munson v. Munson*, 27 Cal.2d 659, 665 (1946). The societal cost of such an exclusionary rule is too great. Under the common law, no relevant evidence could be excluded as a result of its procurement, whether by illegal, immoral, or nonconsensual means, no matter who procured it. *Olmstead v. United*

States, 277 U.S. 438, 467 (1927), J. Wigmore on Evidence § 2183 at 6-8 (1961) and McCormick on Evidence § 164 (4th ed. 1992). The California dictum from *Conn v. Superior Court*, 196 Cal.App.3d 774 (1987) relied on and quoted by the District Court misrepresents the development of common law and the status of discovery law.[4]

The defense of the individual's constitutional rights to acquire, possess and use information evidencing wrongdoing is a matter of tremendous public importance. Who can forget the spectacle of the chief executives of the seven largest American tobacco companies testifying lockstep before a Congressional subcommittee on April 14, 1994, that nicotine is not addictive? "Wrongfully" obtained documents cleared the smoke. *See Castano v. American Tobacco Co.*, 896 F.Supp. 590 (E.D. La. 1995). Irrespective of the merits of the tobacco litigation, Americans were alarmed and distressed by this brazen public lying under oath.

Business is only as honest as its employees. Documents protect the employee or insider who objects to unlawful conduct and attempts to rectify it. Ordered seizure of a smoking gun document is ordered seizure of the employee's

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[4] United States District Court Order re: Confidential Information and Return of Personnel Files, ¶ 11: "... See Conn v. Superior Court, 196 Cal.App.3d 774, 781 (1987) ("Regardless of whether some of the documents may be ultimately discoverable, defendants have, and have always had, the right to keep their own documents until met with proper discovery requests or ordered to disclose them by the Court.) ..."

shield. Document seizure orders effectively shut down the inside policing of business. They shut down the threat of accountability, a fundamental element of an ordered liberty. *Davis v. Passman*, 442 U.S. 228, 242 (1979).

The Court should grant certiorari because the United States Court of Appeals for the Ninth Circuit has decided that the District Court may order seizure of information in contravention of the Fourth Amendment and irrespective of the high societal costs because, sitting in equity, it disapproves of the manner in which the information was acquired. The question of whether our Fourth Amendment right to possess information may be derogated to the District Court's equitable assessment of wrongdoing has not previously been decided in a civil case by the Court and should be decided.

D. THE COURT SHOULD GRANT CERTIORARI BECAUSE, AS A POLICY MATTER, THE INFORMATION SEIZURE ORDER AFFIRMED BY THE UNITED STATES COURT OF APPEALS SQUELCHES NO-LITIGATION SETTLEMENT. DEFENDANTS HAVE REMEDIES AT LAW IF THE ACT OF ACQUIRING, POSSESSING OR USING THE INFORMATION IS UNLAWFUL.

The parties to a dispute should acquire all of the information they possibly can about their dispute before commencing litigation. It encourages informed settlement without litigation. "Self-help" is not a dirty word. People are supposed to help themselves.

The remedy for objectionable conduct, including unlawful acquisition, possession or use of information, is a lawsuit for damages, if the conduct is actionable. Where the conduct is associated with the exercise of First Amendment rights, as it is here, it's the only remedy. *In the Matter of Providence Journal Co.*, 820 F.2d 1342, 1350 (1st Cir. 1986).

CONCLUSION

The petitioner submits that the District Court never had jurisdiction of the acquisition, possession or use outside of the court's process, of the information. The information was acquired independent of the court's process and there is no pleaded counterclaim for possession. The District Court could order discovery of the information but there was no need. The photocopies had been voluntarily disclosed. The facts are not complicated. The information seizure order transparently transgresses Article III, the First Amendment and the Fourth Amendment of the United States Constitution. It cannot be shielded from the Court's review by any or all of the other orders and judgments.

This petition for writ of certiorari should be granted because the United States Court of Appeals for the Ninth Circuit has decided important questions of federal law which have not been decided but should be settled by this Court:

(1) whether it is permissible for a District Court acting pursuant to its inherent authority or the Federal rules of Civil Procedure to sanction prelitigation primary

conduct;

(2) whether the District Court may sanction or restrain the exercise of First Amendment rights outside of the court's process to control the acquisition of information which may be used in litigation; and

(3) whether the District Court may abrogate the Fourth Amendment during litigation.

Moreover, this petition for writ of certiorari should be granted because the United States Court of Appeals for the Ninth Circuit has permitted the District Court to so far depart from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power.

October 18, 1999
Oakland, California

Respectfully Submitted,

Charlotte Hamann
In Pro Se

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

CHARLOTTE A. HAMANN,

Petitioner

v.

BIO-RAD LABORATORIES, INC.

a Delaware Corporation,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Charlotte Hamann
P.O. Box 24586
Oakland, CA 94623
510-530-5540

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[FILED
AUG 29, 1997
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Charlotte A. Hamann	)	No. C-96-2692 SI
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER** RE:
	)	CONFIDENTIAL
Bio-Rad Laboratories, Inc.,	)	INFORMATION AND
	)	RETURN OF PERSONNEL
Defendant	)	FILES
	)	
_____	)	

On August 15, 1997, the Court heard argument on defendant's motion for Protective Order, and for return of confidential information. Having considered the arguments of counsel and the papers submitted, the Court hereby GRANTS defendant's said motion.

It is hereby ordered that:

1. All documents, discovery responses, deposition testimony, and other materials provided in connection with discovery in this matter which, according to applicable laws, constitute confidential information, may be designated by either

party[1] as confidential. Any materials designated as "Confidential Information," shall only be used for prosecution or defense of this litigation.

2. Nothing designated as "Confidential Information" shall be discussed with, disclosed or exhibited to any person or entity, except as provided herein.

3. Unless agreed to by the party producing the information, or otherwise provided in this order or subsequent order of the Court, Confidential Information shall not be revealed to any person or entity except: the parties themselves, counsel for the parties, experts, counsel's or party's paralegals, support staff and other professionals who are directly employed or retained by and assisting counsel or party in the preparation for and trial of this action, the Court, court staff, persons in the Court as court reporters, mediators and evaluators.

4. Any person, other than those listed above, to whom Confidential Information will be disclosed must first be provided with a copy of this Protective Order. Each such person shall execute an undertaking indicating their agreement to be bound by the Protective Order before any Confidential Information is disclosed to that person. Said undertaking shall be maintained by the counsel who has obtained it. The parties and their counsel shall each take appropriate steps to ensure that the terms of this Protective Order are adhered to by all persons to whom Confidential Information is disclosed.

5. No person furnished with Confidential Information will disclose it to any person who is not entitled to receive it under the terms of this Order.

---

[1] All references to the "parties" refer to Plaintiff Charlotte Hamann, and defendant Bio-Rad Laboratories, Inc.

6. Any Confidential Information which any counsel or party files with the Court in this Action, or any pleading or other document purporting to reproduce or paraphrase any Confidential Information, shall be filed in a sealed envelope or other appropriate sealed container on which shall be recorded the title of this action, the nature of the contents, the word "CONFIDENTIAL," and a statement in substantially the following form:

Subject to Protective Order C96-2692 SI N.D. CAL.

7. No person shall for any reason disclose or make use of any of the Confidential Information other than as set forth herein or by further Order of the Court.

8. All copies of documents constituting or including Confidential Information which are produced in the course of this litigation shall be returned to the party designating it as Confidential, or to counsel representing the designating party upon final disposition of this action, whether that be by dismissal, judgment following any appellate proceedings, or otherwise.

9. This Protective Order shall govern only pretrial proceedings. However, nothing shall preclude either party from requesting that the Court extend it to the trial of this action.

10. Nothing in this Protective Order affects the admissibility of any documents, writings, testimony or other evidence at trial or restricts the use of information from sources other than the Confidential Information, except as set forth herein.

11. The Court finds that the third party personnel files which plaintiff concedes were taken by her from the files of defendant Bio-Rad, are the property of defendant and contain confidential information. Accordingly, plaintiff is ordered to return to defendant all copies of third party personnel files no

later than September 5, 1997. See Conn v. Superior Court, 196 Cal.App.3d 774, 781 (1987) ("regardless of whether some of the documents may be ultimately discoverable, defendants have, and have always had, the right to keep their own documents until met with proper discovery requests or ordered to disclose them by the Court."); see also In re IBP Confidential Business Documents Litig., 754 F.2d 787 (8th Cir. 1985); Furnish v. Merlo, 128 Lab.Cas. (CCH) ¶57,755 (D.Or. Aug. 29, 1994).

12. Plaintiff shall deliver to this Court any documents summarizing, quoting from or otherwise recording information concerning the nature or contents of these confidential files. Plaintiff shall also submit to the Court a declaration, signed under penalty of perjury, that she has retained no copies of the third party personnel files.

IT IS SO ORDERED.

Dated: August 28, 1997

[S/]
SUSAN ILLSTON
United States District Judge

[FILED
OCT 24, 1997
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS]

UNITED STATES COURT OF APPEALS
FOR NINTH CIRCUIT

Charlotte Hamann	)	No. 97-71145
	)	
Petitioner,	)	DC# CV-96-2692 SI
	)	Northern California
vs.	)	
	)	**ORDER** [DENYING
United States District Court	)	WRIT RELIEF]
for the Northern District of	)	
California	)	
Respondent,	)	
	)	
Bio-Rad Laboratories, Inc.,	)	
a Delaware Corporation,	)	
	)	
Real Party in Interest	)	
	)	

Before: THOMPSON, T.G. NELSON AND KLEINFELD, Circuit Judges

Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. See Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

[FILED
FEB 2, 1998
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Charlotte Hamann	No. C-96-2692 SI
Plaintiff,	**ORDER** CONDITIONALLY GRANTING DEFENDANT'S MOTION TO DISMISS FOR VIOLATION OF COURT ORDER
v.	
Bio-Rad Laboratories, Inc., et al, Defendants.	

_____ /

INTRODUCTION

On January 23, 1998, the Court heard extensive arguments on defendant's motion to dismiss for failure to comply with this Court's August 28, 1997, Order re Confidential Information and Return of Personnel Files ("Order"). Having considered the arguments of counsel and the papers submitted, the Court hereby conditionally GRANTS defendant's motion to dismiss and DENIES defendant's motion for attorney's fees.

BACKGROUND

Plaintiff brought this action against defendant pursuant to 42 U.S.C. § 2000e et seq. for unlawful employment

discrimination. During the course of litigation, a dispute developed surrounding personnel documents plaintiff admitted she removed from Bio-Rad. On August 28, 1997, the Court ordered plaintiff to "return to defendant all copies of third party personnel files [and]...deliver to this Court any documents summarizing, quoting from or otherwise recording information concerning the nature or contents of these confidential files."

Plaintiff was ordered to return these documents to defendant no later than September 5, 1997. Plaintiff refused to comply and instead brought a motion for Stay of the Order on September 9, 1997. The Court granted the stay on September 23, 1997, so that plaintiff could petition the Ninth Circuit Court of Appeals for a writ of mandamus to rescind the Order. The writ was denied by the Ninth Circuit on October 24, 1997.

During proceedings held October 31, 1997, plaintiff again indicated to the Court that she would not return the documents. The Court warned plaintiff that failure to comply with the Order could result in dismissal. However, plaintiff continues to refuse to comply with the Order on the grounds that it violates Article III, Section 2 of the Constitution and the First Amendment.

Presently before this Court is defendant's motion to dismiss with prejudice for plaintiff's willful violation of the Order and a motion to award defendant attorney's fees incurred in bringing this motion.

LEGAL STANDARD

A. Court's Authority to Impose Sanctions

There are three possible sources of the Court's authority to dismiss a case for failure to comply with an order. First, Federal Rule of Civil Procedure 41(b) provides that pursuant to a defendant's motion, the District Court may dismiss an action for failure to comply with an order of the Court. Second, FRCP

16(f) provides that if a party disobeys and scheduling or pre-trial order, the Court may order sanctions, including dismissal, as set forth in FRCP 37(b)(2)(b)-(d). Finally, the Court possesses inherent power to impose sanctions against a party for bad faith conduct or willful disobedience of a court order. See Chambers v. Nasco, Inc., 501 U.S. 32, 43 (1991). This inherent power includes the power to dismiss where appropriate. See Thompson v. Housing Authority, 782 F.2d 829, 832 (9th Cir. 1986), cert. denied, 107 S.Ct. 112 (1986). The Court may appropriately reject less drastic sanctions when it anticipates continued deceptive misconduct. See Anheuser-Busch v. National Beverage Distributions, 69 F.3d 337, 352 (9th Cir. 1995).

Because dismissal is such a serious measure, courts balance the following five factors when deciding to dismiss a case: (1) the public's interest in expeditious resolution of litigation; (2) the Court's need to manage its docket; (3) the risk of prejudice to the other party; (4) the public policy favoring the disposition of the case on the merits; and (5) the availability of less drastic sanctions. Malone v. United States Postal Service, 833 F.2d 128, 130 (9th Cir. 1987), cert. denied sub.nom. Malone v. Frank, 499 U.S. 819 (1988) (quoting Thompson, 782 F.2d at 831).

Where a court order is violated, the risk of prejudice to the other party and the extent to which less drastic sanctions are available can be determinative. See Adriana International Corporation v. Thoeren, 913 F.2d 1406, 1413 (9th cir. 1990) cert. denied 498 U.S. 1109 (1991). The court has attempted to use less drastic sanctions if it grants the noncompliant party time to amend its behavior. See Ferdik, 963 F.2d at 1262. In addition, a district court is deemed to have considered less drastic alternatives if it warns the party that failure to obey the court's order will result in dismissal. See id. A significantly

strong showing of factors one, two and five also supports dismissal. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th cir. 1992).

B. Attorney's Fees

The Court has inherent authority to impose attorney's fees as sanctions for the "willful disobedience of a court order." Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991). In addition, FRCP 37(b) authorizes a judge to order a non-compliant party to "pay reasonable expenses, including attorney's fees". The Court has discretion whether or not to impose sanctions for violations of its orders. See Air Separations, Inc. v. Underwriters at Lloyds of London, 45 F.3d 288, 291 (9th Cir. 1995).

DISCUSSION

Defendant argues that plaintiff's case should be dismissed with prejudice because of plaintiff's willful and bad faith refusal to comply with a valid court order.

Plaintiff argues that the Order is void and thus unenforceable because the Court does not have jurisdiction over information not obtained through discovery. In addition, plaintiff argues that the Order violates her First Amendment rights because she possesses a lawful right to the information in order to prevent Bio-Rad from misusing it. Finally, plaintiff argues that the files should not be returned because Bio-Rad has fabricated documents which counter the information therein and will likewise fabricate these documents if they are returned.

The district court has the authority to dismiss a case for failure to comply with its order. In this case, dismissal is appropriate because plaintiff demonstrates willfulness and bad faith in violating the Court order. Plaintiff has been in violation

of this Order since September 5, 1997. Plaintiff has been given repeated opportunities to comply with this Order. This Court granted a stay of proceedings so that she could petition the Ninth Circuit. The petition was denied on October 24, 1997, yet plaintiff repeatedly stated in Court on October 31, 1997, that she would not return the documents. She was warned during that hearing that her disobedience could result in dismissal, which she acknowledged. Thereafter, the instant motion to dismiss was filed by the defendant. Both in her written opposition and in her argument at the hearing, plaintiff continued to state that she would not comply with the Order because she considers it invalid.

Plaintiff's objections to the validity of the Order were raised in this Court in the first instance, and in the Ninth Circuit in plaintiff's writ petition; both times they were rejected. If a party disagrees with the validity of a court order, the party must obey the order and then petition to have the order vacated or amended. See Zapon v. U.S. Department of Justice, 53 F.3d 283, 285 (9th cir. 1995); Walker v. City of Birmingham, 388 U.S. 307, 314-315 (1967). The only exception to this rule arises when the order is "transparently invalid." See Zapon, 53 F.3d at 285; Walker, 388 U.S. at 315; U.S. v. Terry, 17 F.3d 575, 579 (2nd Cir. 1994). An order is only "transparently invalid" when it clearly has a frivolous pretense of validity or it constitutes an invalid prior restraint in the First Amendment context. See Walker, 388 U.S. at 315.

The Order is not "transparently invalid" because it is clearly within its authority. The Court has a right to expect compliance since it is protecting the interests of employees who are third parties to the litigation. The Court also has a strong interest in ensuring that parties operate within the confines of the law rather than resorting to "self-help" tactics. See Conn v.

Superior Court, 196 Cal.App.3d 774,781 (1987); In re IBP Business Documents Litig., 754 F.2d 787 (8th Cir. 1985). Plaintiff has failed to raise a valid First Amendment challenge because plaintiff has no right to wrongfully-obtained information about third-parties to the litigation. See Cal. Lab. Code § 2860. Removing and copying an employer's confidential documents relating to other employees, in the middle of the night and in the course of an employment dispute, constitutes misconduct for which an order for return may be issued. See Pillsbury Madison & Sutro v. Schectman, 55 Cal.App.4th 1279, 1294-96 (1997); Furnish v. Merlo, 128 Lab. Cas. (CCH) ¶ 57.755. (CD. Or. Aug. 27, 1994); Conn v. Superior Court, 196 Cal.App.3d 774 (1987).

In weighing the five factors, the Court finds that because plaintiff continues to violate the Order even after being given ample opportunity to comply, dismissal is proper. The factor weighing most heavily in this Court's decision is that in order to manage its docket, the Court must be able to expect compliance from those who invoke its jurisdiction.

In addition, alternative sanctions have been exhausted. Plaintiff was granted a stay to petition the Ninth Circuit to no avail. She was warned by this Court on October 31, 1997 that failure to comply with a court order could result in dismissal and was advised to seek advice from counsel regarding her decision to disobey the Court's order. At the hearing on January 23, 1998, the plaintiff remained adamant. Therefore, alternative sanctions have been exhausted by this Court. Nevertheless, the Court will grant plaintiff one final opportunity to comply with the Order before dismissing her case: this order of dismissal is conditional, and will not become effective if, on or before February 20, 1998, plaintiff fully complies with the August 28, 1997 Order and so notifies the Court in writing.

The grant of attorney's fees is within the Court's authority. However, the Court, in its discretion, declines to award attorney's fees.

CONCLUSION

For the foregoing reasons defendant's motion to dismiss is GRANTED and this matter is DISMISSED WITH PREJUDICE unless, on or before February 20, 1998, plaintiff fully complies with the August 28, 1998 Order. The motion for attorney's fees is DENIED.

IT IS SO ORDERED.

Dated: February 2, 1998

[S/]
SUSAN ILLSTON
United States District Judge

[FILED
MAR 16, 1998
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Charlotte Hamann

Plaintiff,

v.

Bio-Rad Laboratories, Inc.,

et al, Defendants

/

No. C-96-2692 SI

ORDER DISMISSING ACTION

By order dated February 2, 1998, this Court conditionally granted defendant's motion to dismiss and ordered that the case would be dismissed with prejudice unless, on or before February 20, 1998, plaintiff fully complied with the August 28, 1997 Order Re Confidential Information and Return of Personnel Files.

Plaintiff requested and received from this Court a stay of the conditional dismissal order until March 13, 1998, so that plaintiff could seek relief by way of writ from the Ninth Circuit. No stay or writ relief having been received from the Ninth Circuit, and plaintiff not having complied with the August 28, 1997 Order requiring return of the personnel files, the Court

hereby dismisses this action with prejudice.

IT IS SO ORDERED.

Dated: March 16, 1998

[S/]
SUSAN ILLSTON
United States District Judge

[FILED
MAR 16, 1998
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Charlotte Hamann

Plaintiff,

v.

Bio-Rad Laboratories, Inc.,

et al, Defendants.

_____ /

No. C-96-2692 SI

JUDGMENT

In accordance with the Order Dismissing Action, dated March 16, 1998, judgment is hereby entered in favor of defendant and against plaintiff.

IT IS SO ADJUDGED.

Dated: March 16, 1998

[S/]
SUSAN ILLSTON
United States District Judge

[FILED
APRIL 10, 1998
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS]

UNITED STATES COURT OF APPEALS
FOR NINTH CIRCUIT

Charlotte A. Hamann	)	No. 98-70184
	)	
Petitioner,	)	DC# CV-96-2692 SYI
	)	Northern California
vs.	)	
	)	**ORDER** [DENYING WRIT
United States District Court	)	RELIEF]
for the Northern District of	)	
California,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
Bio-Rad Laboratories, Inc.,	)	
a Delaware Corporation,	)	
	)	
Real Party in Interest	)	
_____	)	

Before: BRUNETTI, RYMER, and T.G. NELSON, Circuit Judges

Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. See Bauman v. United States District Court, 557

F.2d 650 (9th Cir. 1977). Accordingly, the petition is ordered filed and is denied.

All pending motions are denied as moot.

No motions for reconsideration, rehearing, clarification, or any other submissions shall be filed or entertained in this closed docket.

NOT FOR PUBLICATION

[FILED
MAY 13, 1999
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS]

UNITED STATES COURT OF APPEALS
FOR NINTH CIRCUIT

Charlotte Hamann, Plaintiff-Appellant, V. Bio-Rad Laboratories, Inc., a Delaware Corporation, Defendant-Appellee	No. 98-15512 D.C. No. CV-96-02692-SI MEMORANDUM [1] [DECISION AFFIRMING JUDGMENT OF DISTRICT COURT]

Appeal from the United States District Court
for the Northern District of California
Susan Illston, District Judge, Presiding

Submitted May 10, 1999 [2]

Before: SCHROEDER, FERNANDEZ, and W. FLETCHER, Circuit Judges

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[[1, 2] Footnotes at end of order.]

Charlotte Hamann appeals pro se from the district court's dismissal of her employment discrimination action. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review for abuse of discretion a district court's dismissal pursuant to Fed. R. Civ. P. 41(b), *see Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992), and we affirm.

We reject Hamann's contention that the district court erred by dismissing her action with prejudice based on her failure to comply with an order of the district court to turn over personnel files she admitted taking from the defendant. We conclude that Hamann's discovery requests concerning personnel files brought the issue of the stolen files within the province of the court's powers to regulate discovery. *See United States v. CBS, Inc.*, 666 F.2d 364, 368-69 (9th Cir. 1982). Given Hamann's adamant and repeated refusals to return the personnel files, and the district court's numerous warnings that Hamann could lose the case as a sanction for failing to turn over the files, we conclude that the district court did not abuse its discretion by dismissing her action. *See Ferdik*, 963 F.2d 1263.

We also conclude that the district court also did not abuse its discretion by awarding costs to defendants. *See* Fed. R. Civ. P. 41(b) & 54(d); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991).

Finally, because we affirm the district court's dismissal for failure to obey a court order, we conclude that Hamann has forfeited her right to challenge any additional orders entered by the district court and deny her remaining contentions. *See Al-Torki v. Kaempen*, 78 F.3d 1381, 1386 (9th Cir. 1996); *Ash*, 739 F.2d at 497-98.

We deny Hamann's request for judicial notice.

AFFIRMED.

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed.R.App.P. 34(a)(2). Accordingly, Hamann's request for oral argument is denied.

[FILED
JULY 26, 1999
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS]

UNITED STATES COURT OF APPEALS
FOR NINTH CIRCUIT

Charlotte Hamann,

Plaintiff-Appellant,

V.

Bio-Rad Laboratories, Inc., a Delaware Corporation,

Defendant-Appellee

No. 98-15512

D.C. No. CV-96-02692-SI
Northern California

ORDER [DENYING PETITION FOR REHEARING]

Before: SCHROEDER, FERNANDEZ, and W. FLETCHER, Circuit Judges

The panel has voted to deny appellant's petition for panel rehearing.

No further filings shall be accepted in this closed appeal.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED AND NOT INCLUDED IN BODY OF PETITION

RULE 26(c), FED. RULES OF CIV. PROC.

"Upon motion by a party or by the person from whom discovery is sought, accompanied by aa certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as

directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion."

EXCERPTS OF REPORTERS' TRANSCRIPTS OF DISTRICT COURT PROCEEDINGS [1]

AUGUST 15, 1997, HEARING

"MS. HAMANN: Well, your honor, there's another issue here and that is that [Bio-Rad's counsel has] asked for return of these photocopies.

THE COURT: Right, the ones you took before.

MS. HAMANN: You understand, of course, that they still have the file set. I didn't take the files.

THE COURT: I understand that but so do you, and you photocopied them prior and without permission --

MS. HAMANN: I didn't need permission.

THE COURT: All right. I understand your position. I've read your papers.

MS. HAMANN: Okay. And I will tell you that I will not turn them over to the court.

THE COURT: That's fine." (E.R. 67, R.T. 11:8-20.)

OCTOBER 31, 1997, HEARING

"MR LYNCH [respondent's counsel]: We also have the outstanding issue of your order that Ms. Hamann return our documents to us.

MS. HAMANN: I do want to comment on that because I want to make sure I don't--that you don't misunderstand what my position is on that.

---

[1] The reporters' transcripts are included in the Excerpts of Record filed in the United States Court of Appeals for the Ninth Circuit.

Your order is in place. However, I am not going to return the documents that --

THE COURT: You are not?

MS. HAMANN: No, I am not.

THE COURT: And that -- you raised that with the Ninth Circuit, right?

MS. HAMANN: Yes, I did.

THE COURT: And there was no relief provided?

MS. HAMANN: There was a summary denial.

THE COURT: Well, there can be very serious consequences to that.

MS. HAMANN: Well, there are some really important First Amendment issues there, and I think that the usual procedure is they move to compel, and I will respond to that, and then I will be set up for another appeal.

THE COURT: Well, you have been ordered to produce them, so what they would probably move for is that you be held in contempt.

MS. HAMANN: Well, I hope that's not the case. But I understand that may happen. And, as I explained in my -- I think this is a matter that requires full hearing and that's why I brought this up. I am moving -- I am inviting them to move to compel so that the matter can be all cleaned up and set forward, and you will hear once again the First Amendment argument, and I will probably cross move to reconsider.

It's such an important matter that I can't do it. I have not -- I am continuing to maintain the confidentiality of those documents because that's what I did from the outset and that's what I would do no matter what.

But the issues are too important. And I want to -- as I stated in that writ petition, I really want -- I think it's important for you to understand, I do not take it lightly that I have made

the decision to do this. I think it's very serious.

THE COURT: Well, it is. I just want you to understand there could be very serious consequences to it.

MS. HAMANN: I feel that this is something that may only reach the appellate bench this way. But I cited U.S. Supreme Court case after U.S. Supreme Court case in support of my [petition]. I realize that they are less likely to listen to someone in pro se but someone has got to do it. This is a really important issue. And I -- if the matter had been adjudicated and given to the jury to decide, then I would not have a dispute with that. My dispute is the manner with which it was adjudicated, which was extra jurisdictional and lawless.

THE COURT: All right. Well, that -- as long as you understand that the consequences of defying a court order, which is what you are proposing to do, can be extremely serious. You just -- I hope -- you mentioned that you consult with lawyers from time to time and I don't know if that's true. But if you do, I would urge you to do that on this issue as well. Because I want you to understand precisely the consequences of what you choose to do.

MS. HAMANN: Well, I presume the consequences will be within the law, although the adjudication was not within the law, and that's -- that's how I proceed, is with the -- with the objective and belief that the court will adjudicate within the law.

...

MS. HAMANN: I think this is an extraordinary -- it's a very, very important issue, and it has been given short shrift by the courts, and it has been adjudicated lawlessly, and it has got to stop. So that means in order to have standing, someone has got to take the hit, I guess. Somebody has got to do it.

THE COURT: All right." (E.R. 139, R.T. 42:25-47:10)

JANUARY 23, 1998, HEARING

"MS. HAMANN: I'm not -- I have some additional matters I would like to bring to the Court regarding that, and whether or not the Court, in fact, has the right to dismiss the case or, in fact, to what it has done.

But in addition to that, beyond the possibility of dismissal, I abhor lawlessness, when the Court is proceeding in that matter. I found considerable support in one of the cases cited by the defendant, Chambers v. NASCO, related to attorney's fees and award of attorney's fees where there were [contempts] of court -- in that dissent, curiously -- actually I don't think so curiously -- was Justice Rehnquist, Justice Souter, Justice Scalia and Justice Kennedy. We are seeing increasing lawlessness in our courts, where the courts have disregarded statutes and the constitution.

The court -- federal courts routinely look at their jurisdictional issues to determine whether or not they have jurisdiction. State courts are not as firm about this and they tend to be more lax. But this was a very important question, and it's a very important question for the people of this country, whether a court has jurisdiction. We don't bring our courts into our business unless -- except under certain circumstances.

THE COURT: You brought your case to this court Ms. Hamann. You invoked the jurisdiction of this court.

MS. HAMANN: I invoked the jurisdiction of this court with respect to certain subject matter. The possession of the documents is not a matter over which this court has jurisdiction. I did not obtain the documents with the court's process.

THE COURT: No, that's certainly true.

MS. HAMANN: That's right. That's what Seattle Times Company v. Rhinehart makes very clear. At page 34 -- that's

467 U.S., page 20, and then at page 34, it makes it very clear that if documents are not obtained with the court's process, then the court cannot reach out and touch those documents and seize them. It's there. (E.R. 154, R.T. 4:16-6:1)

...

[MS. HAMANN]: Now, I think employees do have information about how companies conduct their business. We keep companies honest. We keep this country honest just by the potential threat that someone will acquire this information and it may be used against you. People can find out.

They're never going to find out if the employees don't have the courage to step forward and do something about this, and we won't be able to keep this country honest, and our courts will be in all of our business.

When people try and resolve these matters by acquiring information, they do so with the objective of avoiding litigation, to keep the company honest. We tell you about it, they'll know about it, and then we can clean it up before we ever get to court. (E.R. 154, R.T. 17:6-19)

...

"MS. HAMANN: I don't take lightly the violation of a court order. I believe, however, I am confident that you do not have jurisdiction of the subject matter in this case; and for that reason, where the court does not have subject matter jurisdiction, there is no contempt of court. This is clearly not true if it is a merely legally erroneous ruling, and I understand that." (E.R. 154, R.T. 3:8-14.)

...

"[HAMANN]: It's a document seizure order. Those documents were disclosed to [Bio-Rad] voluntarily, immediately. That's the way it went. I volunteered it. I told [Bio-Rad] about it." (E.R. 154, R.T. 22:6-9.)

"[HAMANN]: I have made my position clear. I have not attempted to evade this issue. I have not misled the court in any way, and I believe the transcript shows that I brought it to the court's attention and said, from the very beginning, I said I cannot give you those documents, I can't turn them over. It's just too serious an issue." (E.R. 154, R.T. 25:3-8.)

[FILED
MAR 16, 1997
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA]

CHARLOTTE HAMANN
P. O. Box 1096
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In Pro Se

THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Charlotte A. Hamann,

Plaintiff,

v.

Bio–rad Laboratories, Inc., a Delaware Corporation, and Does I through X, inclusive.

Defendants.

Civil No. C 96-2692 SI

FIRST AMENDED COMPLAINT FOR DAMAGES FOR SEX DISCRIMINATION, UNLAWFUL RETALIATION FOR ENGAGING IN PROTECTED ACT, TORTIOUS DISCHARGE IN VIOLATION OF PUBLIC POLICY, AND BREACH OF CONTRACT

JURY TRIAL DEMANDED

Plaintiff, CHARLOTTE HAMANN alleges:

JURISDICTION

1. This is an action for sex discrimination under 42 U.S.C. § 2000e, et seq. and this Court therefore has jurisdiction of this action pursuant to 28 U.S.C. § 1331. This Court has supplemental jurisdiction of plaintiff's transactionally related state law claims pursuant to 28 U.S.C. § 1367. The amount in controversy, exclusive of interest and costs, exceeds $10,000.

INTRADISTRICT ASSIGNMENT

2. A substantial part of the events, omissions, and occurrences which give rise to plaintiff's claims occurred in Contra Costa County, State of California. Pursuant to Civil L. R. 3-2(c), the San Francisco Headquarters or the Oakland Division of this court is the proper assignment.

FIRST CLAIM FOR SEX DISCRIMINATION FAILURE TO PROMOTE IN VIOLATION OF 42 U.S.C. § 2000e-2

3. Plaintiff, Charlotte A. Hamann (hereinafter referred to as "HAMANN") is a female and is, and at all times relevant herein was, a citizen of California residing in Contra Costa County.

4. Defendant BIO-RAD LABORATORIES is, and at all times relevant herein was, a corporation organized under the laws of the State of Delaware, with its principal place of business within the County of Contra Costa, State of California. BIO-RAD LABORATORIES regularly employs more than fifteen full-time employees and is an employer within the definition of 42 U.S.C. § 2000e(b).

5. Plaintiff does not know the true names and capacities, whether individual, partnership, corporate, associate, or otherwise of defendants DOE I through DOE X, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to include the DOE defendants' names and capacities once they are known. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is legally responsible in some manner for the events, omissions and occurrences alleged in this complaint and further alleges that these events, omissions and occurrences caused the injuries and damages alleged herein. Hereinafter BIO–RAD LABORATORIES and DOES I through X, inclusive, shall be referred to as "BIO–RAD".

6. At all times mentioned in this complaint, unless otherwise alleged, each defendant was the agent, employee, or co-conspirator of every other defendant, and in doing the acts alleged in this complaint, was acting within the course, scope and authority of that agency, employment, or in furtherance of the conspiracy, with the knowledge and consent of the other defendants.

7. In or about February, 1987, plaintiff HAMANN was hired for employment by BIO–RAD at its facilities within the County of Contra Costa as a "process engineer". HAMANN remained employed with BIO–RAD until June 22, 1994, at which time HAMANN was involuntarily terminated from her employment with BIO–RAD. During the time HAMANN was employed by BIO–RAD, HAMANN fully and satisfactorily performed her job responsibilities.

8. From February, 1987, and continuing thereafter up to and including June 22, 1994, BIO–RAD engaged in a course of conduct constituting discrimination in employment on the basis of HAMANN's gender including but not limited to:

8(a). In or about February, 1991, through June 22, 1994, BIO–RAD failed and refused to promote HAMANN to the position of "senior engineer" even though HAMANN was fully qualified for the position, BIO–RAD acknowledged that HAMANN was fully qualified for the position, BIO–RAD was actively seeking to hire a "senior engineer," BIO–RAD acknowledged that it was unable to find an engineer outside the company more qualified than HAMANN was for the position of "senior engineer," and a male engineer was hired during this time period as a "senior engineer."

8(b). HAMANN is informed and believes and on the basis of such information and belief alleges that between February, 1991, through and including June 22, 1994, she had equal or better experience, qualifications, and education than the experience, qualifications, and education of the male engineer who was hired by BIO–RAD as a "senior engineer" during this time period.

8(c). HAMANN is informed and believes and on the basis of such information and belief alleges that between February, 1987, and June 22, 1994, it was BIO–RAD's practice to promote or hire a qualified engineer to the position of "senior engineer," when a "senior engineer" position was available, provided that engineer also had five years engineering experience and a bachelor's degree in engineering. As of June 22, 1994, HAMANN had more than ten years of engineering and engineering related experience, of which seven and one third years of engineering experience was acquired at BIO–RAD. HAMANN had also earned three college degrees, including a bachelor's degree in engineering, a bachelor's degree in chemistry, and a master's degree in chemistry.

8(d). In April, 1994, HAMANN informed BIO–RAD that she intended to leave the company. To induce HAMANN to

continue her employment with BIO–RAD, BIO–RAD told HAMANN that she would be promoted to the position of "senior engineer."

8(e). Within several days after making the representation alleged in paragraph 8(d), BIO–RAD wrote on HAMANN's annual Management/Professional Performance Evaluation "Charlotte should be promoted to a Sr. Engineer."

8(f). Shortly after making the representations alleged in paragraphs 8(d) and 8(e), BIO–RAD told HAMANN that the position of "senior engineer" no longer existed within BIO–RAD. BIO–RAD further told HAMANN that the position of "plant engineer" was the new position and that the position of "plant engineer" was equivalent to the former position of "senior engineer."

8(g). Thereafter, during April, May and June, 1994, BIO–RAD repeatedly and alternately told HAMANN that it was investigating whether or not the "senior engineer" position existed and then told HAMANN that the "senior engineer" position no longer existed within BIO–RAD but that the new position of "plant engineer" was equivalent to the position of "senior engineer."

8(h). HAMANN is informed and believes and on the basis of such information and belief alleges that in May, 1994, while HAMANN was on vacation leave, BIO–RAD distributed within the company a written notice of the availability of a "senior engineer" position.

8(i). HAMANN is informed and believes and on the basis of such information and belief alleges that within one week after the written notice of the availability of a "senior engineer" position was posted inside the company, as alleged in paragraph 8(h), BIO–RAD pulled down the written notice of the availability of a "senior engineer" position, changed the words

"senior engineer" to "plant engineer" but otherwise did not change the job description, and then distributed within the company this modified, written notice of job availability.

8(j). On or after May 20, 1994, BIO–RAD promoted HAMANN to the position of "plant engineer."

8(k). During May and June, 1994, HAMANN's attorney negotiated with BIO–RAD's General Counsel for the position of "senior engineer" for HAMANN. HAMANN is informed and believes and on the basis of such information and belief alleges that BIO–RAD's General Counsel communicated to HAMANN's attorney that he was negotiating in good faith on behalf of BIO–RAD to correct the discriminatory practices which HAMANN was being subjected to, and that further, BIO–RAD was investigating the existence of the "senior engineer" position.

8(l). BIO–RAD never promoted HAMANN to the position of "senior engineer."

8(m). On June 21, 1994, BIO–RAD told HAMANN that she would have to leave her employment with BIO–RAD Laboratories on June 22, 1994.

8(n). HAMANN is informed and believes and on the basis of such information and belief alleges that the position of "senior engineer" did exist within BIO–RAD in April, 1994, and that the position of "senior engineer" continued to exist from February, 1987, through and including the date of filing of this complaint.

8(o). HAMANN is informed and believes and on the basis of such information and belief alleges that between June, 1994, and August, 1996, BIO–RAD hired a male engineer as a "plant engineer" and this male engineer was far, far less qualified when hired as a "plant engineer" than HAMANN was when she was promoted to the position of "plant engineer."

8(p). HAMANN is informed and believes and on the

basis of such information and belief alleges that, between April, 1994, and August, 1996, BIO–RAD actively sought to hire an engineer for the position of "senior engineer."

8(q). HAMANN is informed and believes and on the basis of such information and belief alleges that between June, 1994, and August, 1996, BIO–RAD hired a male engineer as a "senior engineer" and that this male engineer's experience, education, and qualifications were no better at the date of hiring than HAMANN's experience, education and qualifications were at the time she was terminated in June, 1994.

8(r). From on and before February, 1991, through and including June 22, 1994, HAMANN performed work for BIO–RAD which required the experience, education and qualifications of a "senior engineer."

9. During the time that HAMANN was employed by BIO–RAD, BIO–RAD created a separate, unequal, and dead-end promotional path for HAMANN because of her gender.

10. From February, 1987, and continuing thereafter up to and including June 22, 1994, BIO–RAD denied HAMANN career advancement opportunities which were readily made available to male engineers.

11. On or about February 27, 1995, HAMANN filed a timely charge against BIO–RAD with the Equal Employment Opportunity Commission (hereinafter E.E.O.C.) HAMANN provided the E.E.O.C. with a seven page statement of facts which was incorporated into a nine page sworn affidavit. This nine page affidavit is attached as Exhibit A and is incorporated herein by reference.

12. On or about April 29, 1996, the E.E.O.C. issued its notice of HAMANN's right to sue in United States District Court (hereinafter "notice of right to sue") permitting HAMANN to bring this action. HAMANN thereby has exhausted her

prerequisite administrative remedies.

13. BIO–RAD fraudulently concealed the true facts from both HAMANN and E.E.O.C. and intentionally misrepresented facts to both HAMANN and E.E.O.C. about the existence of the "senior engineer" position and about the nonequivalence of the "plant engineer" position to the "senior engineer" position. The circumstances and facts about these intentional concealments and misrepresentations include but are not limited to:

13(a). From April, 1994, through and including June, 1994, BIO–RAD repeatedly represented to HAMANN that if the "senior engineer" position existed at BIO–RAD, HAMANN would be promoted to the position of "senior engineer."

13(b). From April, 1994, through and including June, 1994, in response to HAMANN's inquiries to BIO–RAD about whether any engineers had the title and position of "senior engineer" at BIO–RAD, BIO–RAD repeatedly, represented to HAMANN that no engineers employed by BIO–RAD had the title or position of "senior engineer."

13(c). From May, 1994, through and including June, 1994, BIO–RAD repeatedly, represented to HAMANN that the 1994 job posting of "senior engineer", which is alleged in paragraphs 8(h) and 8(i) was a mistake because the position of "senior engineer" did not exist at BIO–RAD.

13(d). HAMANN is informed and believes and on the basis of such information and belief alleges that when E.E.O.C. investigated HAMANN's charge of unlawful discrimination, E.E.O.C. discovered a BIO–RAD Employee Action Notice stating that a male engineer had the position of "senior engineer" on or about June 23, 1994, and E.E.O.C. also discovered two BIO–RAD Employee Action Notices stating that a second male engineer had the position of "senior engineer" during October, 1993, and during November, 1994.

13(e). On or about April, 1995, E.E.O.C. orally informed HAMANN that E.E.O.C. had discovered BIO–RAD records which revealed that two engineers had the position of "senior engineer" at the very same time that BIO–RAD had represented to HAMANN in 1994 that the position of "senior engineer" did not exist. On or about April, 1995, HAMANN asked E.E.O.C. to give her photocopies of the aforementioned BIO–RAD records but E.E.O.C. refused to give HAMANN photocopies of these records and E.E.O.C. further informed HAMANN that such records must be kept confidential until after E.E.O.C. completed its investigation and administrative proceedings.

13(f). HAMANN is informed and believes and on the basis of such information and belief alleges that BIO–RAD intentionally misrepresented to E.E.O.C. that the information contained on the first Employee Action Notice, alleged in paragraph 13(c), was a "clerical error."

13(g). HAMANN is informed and believes and on the basis of such information and belief alleges that BIO–RAD represented to E.E.O.C. that the title of the second male engineer was changed in September, 1994, from "senior engineer" to "engineer."

13(h). HAMANN is informed and believes and on the basis of such information and belief alleges that BIO–RAD repeatedly represented to E.E.O.C., from on or after February 27, 1995, through and including April 29, 1996, that the "senior engineer" position no longer existed at BIO–RAD, that the "senior engineer" position had been discontinued at BIO–RAD in 1991, that the only reason HAMANN was not promoted to the position of "senior engineer" in 1994 is because the position did not exist, that HAMANN was promoted in 1994 to "plant engineer" on the basis of merit because "plant engineer" was

equivalent to the former advanced position of "senior engineer" and because BIO–RAD needed to fill that position.

13(i). On or after May 13, 1996, and after the E.E.O.C. issued the notice of right to sue, HAMANN obtained photocopies of documents contained in the E.E.O.C. investigation file, including photocopies of the Employee Action Notices alleged in paragraph 13(d). It was not until HAMANN received the aforesaid photocopies that HAMANN learned about the facts alleged in paragraphs 13(d), 13(f), 13(g), and 13(h).

13(j). On or after July 14, 1996, and after the E.E.O.C. issued the notice of right to sue, HAMANN learned that BIO–RAD had advertised in the San Francisco Sunday Examiner & Chronicle newspaper, on July 14, 1996, the availability of the position of "senior engineer" at BIO–RAD.

13(k). After July 26, 1996, HAMANN learned that before July 26, 1996, BIO–RAD had hired a male "senior engineer" into the same department HAMANN had worked when HAMANN was employed by BIO–RAD.

13(l). HAMANN is informed and believes and on the basis of such information and belief alleges that BIO–RAD was seeking to interview or had interviewed employment applicants for the position of "senior engineer" at the very same time that BIO–RAD was representing to E.E.O.C. that the position of "senior engineer" did not exist at BIO–RAD.

14. BIO–RAD engaged in the above-described conduct in an effort to discriminate against HAMANN because of her gender. BIO–RAD did not subject male employees to such discrimination and there was no legitimate business reason for subjecting HAMANN to such discrimination.

15. As a proximate result of BIO–RAD's unlawful gender discrimination, HAMANN has suffered, continues to suffer, and will suffer damages as follows: HAMANN received

lower compensation than she would otherwise have received had she been timely promoted to "senior engineer" and she lost other monetary benefits, training, and career advancement opportunities associated with the position of "senior engineer," and she will in the future receive lower compensation because she was not given the title and position of "senior engineer" and because BIO–RAD's unlawful conduct forced HAMANN to seek administrative and judicial remedies for BIO–RAD's gender discrimination all to her damages in an amount according to proof.

16. BIO–RAD committed the acts herein alleged with the wrongful intention of discriminating against HAMANN because of her gender and with malice or reckless indifference of her rights. HAMANN is therefore entitled to punitive damages from BIO–RAD in an amount according to proof pursuant to 42 U.S.C. § 1981a.

17. Pursuant to 42 U.S.C. § 2000e-5(k), HAMANN is entitled to recover attorney's fees and costs incurred in bringing the within cause of action, in an amount according to proof.

WHEREFORE, plaintiff prays for relief as hereinafter alleged.

SECOND CLAIM FOR SEX DISCRIMINATION
UNLAWFUL RETALIATION FOR ENGAGING IN
PROTECTED ACT IN VIOLATION OF
42 U.S.C. § 2000e-3

18. Plaintiff incorporates in this claim the allegations in paragraphs 1 through 13(l), inclusive, of this complaint.

19. On or about May 12, 1994, HAMANN stated in writing in her annual employee performance review that she had been subject to gender discrimination in that BIO–RAD had

failed and refused to promote her to the position of "senior engineer" because of her gender even though her managers had recommended her promotion to the position of "senior engineer." BIO–RAD demanded that HAMANN remove her statements regarding gender discrimination from the written annual employee performance review. HAMANN refused to remove her statements regarding gender discrimination.

20. BIO–RAD repeatedly threatened HAMANN with adverse consequences if she did not remove her statements regarding gender discrimination from her annual performance review.

21. Until on or after May 20, 1996, BIO–RAD withheld HAMANN'S promotion to the position of "plant engineer" and her promotion to a higher pay level in an effort to coerce HAMANN to remove her statements regarding gender discrimination from her annual performance review and in retaliation for HAMANN's refusal to remove her statements regarding gender discrimination from her annual performance review.

22. On or about June 22, 1994, BIO–RAD terminated HAMANN's employment in retaliation against HAMANN for her having complained that she had been subject to gender discrimination by BIO–RAD.

23. As a proximate result of BIO–RAD's unlawful gender discrimination of and retaliation against HAMANN, HAMANN has suffered, continues to suffer and will suffer damages as follows: HAMANN has lost income and employment benefits, both past and future, including wages, bonuses, sick leave, vacation pay, medical benefits, training, career advancement opportunities, deferred compensation and other monetary benefits associated with her employment, and she will in the future receive lower compensation because she

was not given the title and position of "senior engineer" and because BIO–RAD's unlawful conduct forced HAMANN to seek administrative and judicial remedies for BIO–RAD's gender discrimination all to her damages in an amount according to proof.

24. BIO–RAD committed the acts herein alleged with the wrongful intention of discriminating against HAMANN because of her gender and with malice or reckless indifference of her rights. HAMANN is therefore entitled to punitive damages from BIO–RAD in an amount according to proof pursuant to 42 U.S.C. § 1981a.

25. Pursuant to 42 U.S.C. § 2000e-5(k), HAMANN is entitled to recover attorney's fees and costs incurred in bringing the within cause of action, in an amount according to proof.

WHEREFORE, plaintiff prays for relief as hereinafter alleged.

THIRD CLAIM FOR TORTIOUS DISCHARGE IN VIOLATION OF PUBLIC POLICY STATED IN CALIFORNIA CONSTITUTION, ART. I, SEC 8

26. Plaintiff incorporates in this claim the allegations in paragraphs 1 through 13(l), inclusive, and paragraphs 19 through 22, inclusive, of this complaint.

27. BIO–RAD violated the fundamental public policy of the State of California as reflected in Article I, Section 8, of the California Constitution, by denying HAMANN, because of her sex, the right to promotion on the basis of merit within her profession of engineering as heretofore alleged in paragraphs 3 through 13(l), inclusive, and paragraphs 19 through 22, inclusive, and thereby wrongfully deprived HAMANN of the

right to enter and pursue her profession.

28. BIO–RAD violated the fundamental public policy of the State of California as reflected in Article I, Section 8, of the California Constitution, by terminating HAMANN's employment as heretofore alleged in paragraphs 3 through 13(l), inclusive, and paragraphs 19 through 22, inclusive, and thereby wrongfully deprived HAMANN, because of her sex, of the right to enter and pursue her profession.

29. HAMANN's claim against BIO–RAD for violations of the fundamental public policy of the State of California, as alleged in paragraphs 26, 27, and 28, is timely filed as follows:

29(a). The statute of limitations on this claim is equitably tolled as a result of BIO–RAD's fraudulent concealment of facts and intentional misrepresentation of facts, as alleged in paragraphs 7 through 13(l), inclusive, which actually and effectively precluded HAMANN from seeking judicial remedies for her claims against BIO–RAD. The true facts regarding the existence of the "senior engineer" position within BIO–RAD and the nonequivalence of the position of "plant engineer" to the position of "senior engineer" were peculiarly within the knowledge and control of BIO–RAD.

29(b). HAMANN diligently and timely sought discovery of the true facts regarding the existence of the "senior engineer" position and the nonequivalence of the position of "plant engineer" to the position of "senior engineer, by participating in good faith in E.E.O.C. resolution of her charge of unlawful employment discrimination against BIO–RAD. HAMANN was precluded by federal statutes and regulations, including but not limited to 42 U.S.C. § 2000e-5(b), from utilizing for the purpose of seeking judicial remedies for her claims against BIO–RAD, confidential information discovered by E.E.O.C. until after E.E.O.C. issued the notice of right to

sue and HAMANN had obtained photocopies of documents contained in the E.E.O.C. investigation file.

29(c). California Code Civ. Proc. § 356 provides that the time of the federal statutory and regulatory prohibitions on commencement of this action, as alleged in paragraph 29(b), is not part of the time limited for the commencement of this action.

29(d). BIO–RAD is equitably estopped from asserting the statute of limitations on this claim during the time interval in which HAMANN exhausted the prerequisite administrative remedies for her federal Title VII claims because BIO–RAD's fraudulent concealments and intentional misrepresentations, as alleged in paragraphs 7 through 13(l), inclusive, continued throughout the E.E.O.C. administrative proceedings and BIO–RAD did not participate in good faith in E.E.O.C. resolution of HAMANN's charge of unlawful employment discrimination.

29(e). The statute of limitations on this claim is equitably tolled in the time interval during which HAMANN exhausted the prerequisite administrative remedies for her federal Title VII claims, which are based on essentially the same set of facts as this state claim, as a result of the public policy of the State of California discouraging duplicative proceedings which further burden an already overtaxed judicial system and the public policy of the State of California encouraging the resolution of and elimination of unlawful employment practices by conciliation.

30. As a proximate result of BIO–RAD's violations of public policy as alleged in paragraphs 26, 27, and 28, HAMANN has suffered, continues to suffer, and will suffer damages as follows: lost income and employment benefits, both past and future, including wages, bonuses, sick leave, vacation pay, medical benefits, training, career advancement

opportunities, deferred compensation and other monetary benefits associated with her employment, and she will in the future receive lower compensation because BIO–RAD's unlawful conduct forced HAMANN to seek administrative and judicial remedies for BIO–RAD's gender discrimination, all to her damages in an amount according to proof.

31. BIO–RAD committed the acts herein alleged with malice, fraud, or oppression, with a conscious disregard for HAMANN's rights, or authorized or ratified the wrongful conduct. HAMANN is therefore entitled to punitive damages from BIO–RAD in an amount according to proof.

WHEREFORE, plaintiff prays for relief as hereinafter alleged.

FOURTH CLAIM FOR BREACH OF CONTRACT

32. Plaintiff incorporates in this claim the allegations in paragraphs 1 through 13(l), inclusive, and paragraphs 19 through 22, inclusive, of this complaint.

33. On or about February 19, 1993, BIO–RAD expressly represented to HAMANN:

33(a). that BIO–RAD Laboratories would conduct its business in strict compliance with applicable laws, rules, and regulations and with honesty and integrity;

33(b). that BIO–RAD Laboratories' employees and agents would scrupulously adhere to the highest standards of honesty, integrity and fairness when engaged in any activity concerning the company and in their relationships with each other;

33(c). that BIO–RAD Laboratories was totally committed to total compliance with the letter and spirit of the laws and

regulations governing its actions.

34. On or about March 1, 1994, BIO–RAD again expressly reaffirmed to HAMANN those representations alleged in paragraphs 33(a), 33(b) and 33(c).

35. The representations alleged in paragraphs 33(a), 33(b) and 33(c) were included in BIO–RAD Laboratories' written Code of Ethics and Standards of Conduct. A copy of the Code of Ethics and Standards of Conduct is attached hereto as Exhibit B, and is incorporated herein by reference.

36. The written Code of Ethics and Standards of Conduct created an express agreement between BIO–RAD and HAMANN. In return for HAMANN's compliance with the agreement, HAMANN was assured that BIO–RAD would not subject her to unfairness, dishonesty, or gender discrimination in her employment with BIO–RAD Laboratories.

37. HAMANN undertook and continued her employment with BIO–RAD Laboratories and duly performed all of the terms and conditions of the Code of Ethics and Standards of Conduct, except as to those terms and conditions that BIO–RAD waived or prevented HAMANN from performing.

38. BIO–RAD breached the Code of Ethics and Standards of Conduct by terminating HAMANN's employment for pretextual reasons, by denying HAMANN the position of "senior engineer" for pretextual reasons, by discriminating against HAMANN because of her gender, and by subjecting HAMANN to unfair, dishonest and unreasonable treatment and harassment, as alleged in paragraphs 8 through 13(l), inclusive, paragraphs 19 through 22, inclusive, and in Exhibit A, attached hereto and incorporated herein by reference.

39. As a result of BIO–RAD's breach of its agreement with HAMANN, as alleged in paragraph 38, HAMANN has

suffered, continues to suffer, and will suffer damages as follows: lost income and employment benefits, both past and future, including wages, bonuses, sick leave, vacation pay, medical benefits, training, career advancement opportunities, deferred compensation and other monetary benefits associated with her employment, and she will in the future receive lower compensation because BIO–RAD forced HAMANN to seek administrative and judicial remedies for BIO–RAD's gender discrimination, all to her damages.

WHEREFORE, plaintiff prays for relief as hereinafter alleged.

FIFTH CLAIM FOR BREACH OF CONTRACT BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

40. Plaintiff incorporates in this claim the allegations in paragraphs 1 through 13(l), inclusive, paragraphs 19 through 22, inclusive, and paragraphs 33 through 38, inclusive, of this complaint.

41. The Code of Ethics and Standards of Conduct contains an implied covenant of good faith and fair dealing by which BIO–RAD promised to give full cooperation to HAMANN and her performance under the agreement and to refrain from doing any act which would prevent or impede her from performing all the conditions of the agreement to be performed on her part and further to refrain from doing any act that would prevent or impede HAMANN's enjoyment of the benefits of the agreement. The implied covenant required BIO–RAD and HAMANN to perform the terms of the agreement in good faith.

42. HAMANN, as an employee, was in an inherently unequal position in her dealings with BIO–RAD Laboratories, which is an established business with substantial assets. Only BIO–RAD had access to the true facts about the existence of the "senior engineer" position within BIO–RAD Laboratories. HAMANN committed herself to good faith performance of the Code of Ethics and Standards of Conduct, relied thereon, and therefore was placed in a particularly vulnerable position because she was devoting her energy to performing her duties for BIO–RAD and to correcting the gender discrimination even though BIO–RAD was not performing on the agreement.

43. BIO–RAD breached said covenant of good faith and fair dealing by concealing the true facts regarding the existence of the "senior engineer" position and by not resolving the gender discrimination and unlawful retaliation in good faith.

44. BIO–RAD further breached said covenant of good faith and fair dealing by retaliating against HAMANN for her having stated in her performance appraisal that she had been discriminated against on the basis of her gender. HAMANN was required by the Code of Ethics and Standards of Conduct to inform BIO–RAD of the gender discrimination and was then punished by BIO–RAD for performing her agreement with BIO–RAD.

45. Said breaches were for reasons extraneous to the Code of Ethics and Standards of Conduct, without good cause and for the purpose of frustrating HAMANN's enjoyment of the benefits of that agreement.

46. As a result of BIO–RAD's breach of said covenant of good faith and fair dealing, as alleged above, HAMANN has suffered, continues to suffer, and will suffer damages as follows: lost income and employment benefits, both past and future, including wages, bonuses, sick leave, vacation pay,

medical benefits, training, career advancement opportunities, deferred compensation and other monetary benefits associated with her employment, and she will in the future receive lower compensation because BIO–RAD forced HAMANN to seek administrative and judicial remedies for BIO–RAD's gender discrimination, all to her damages.

WHEREFORE, plaintiff prays for relief as hereinafter alleged.

DAMAGES ON ALL CLAIMS

WHEREFORE, plaintiff prays for judgment against Defendants, and each of them, as follows:

A. For the retroactive award to HAMANN of the title and position of "senior project and process engineer" from January, 1991, through June, 1994;

B. For "back pay" breach of contract damages in excess of $100,000, to the date the jury returns its verdict and the exact amount of which has yet to be ascertained, plus "front pay" breach of contract damages, from the date forward of that on which the jury returns its verdict and in an amount according to proof.

C. For damages on the first, second and third claims according to proof;

D. For punitive damages in an amount according to proof;

E. For interest as allowed by law;

F. For reasonable attorney's fees according to proof;

G. For all costs of suit incurred herein;

H. For such other and further relief as the court may deem just and proper.

Dated: [March 23, 1997] [S/] _____
CHARLOTTE HAMANN
Plaintiff In Pro Se

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial as provided by Rule 38(a) of the Federal Rules of Civil Procedure.

Dated: [March 23, 1997] [S/] _____
CHARLOTTE HAMANN
Plaintiff In Pro Se

[FILED
APR 10, 1997
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA]

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THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Charlotte A. Hamann, Plaintiff, v. Bio–rad Laboratories, Inc., a Delaware Corporation, and Does I through X, inclusive. Defendants.	Civil No. C 96-2692 SI **ANSWER** OF DEFENDANT BIO-RAD LABORATORIES, INC. TO PLAINTIFF'S FIRST AMENDED COMPLAINT FOR DAMAGES

Defendant Bio-Rad Laboratories ("defendant") hereby responds to plaintiff's First Amended Complaint for damages (the "Complaint") as follows:

JURISDICTION

1. Paragraph 1 of the Complaint contains statements and/or conclusions of law concerning jurisdiction to which no answer or response is required. To the extent that paragraph 1 contains allegations that must be answered, defendant admits that this action purports to be brought pursuant to 42 U.S.C. § 2000e and 28 U.S.C. § 1331. Except as so expressly admitted, defendant lacks sufficient information or knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 1 of plaintiff's Complaint, and on that basis, denies each and every remaining allegation contained therein.

INTRADISTRICT ASSIGNMENT

2. Paragraph 2 of the Complaint contains statements and/or conclusions of law to which no answer or response is required. To the extent that paragraph 2 contains allegations that must be answered, defendant lacks sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 2 of the Complaint, and on that basis, denies each and every allegation contained therein.

FIRST CLAIM FOR SEX DISCRIMINATION
FAILURE TO PROMOTE
IN VIOLATION OF 42 U.S.C. § 2000e-2

3. Defendant admits that plaintiff is a female. Except as so expressly admitted, defendant lacks sufficient information or knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 3 of the Complaint, and on

that basis, denies each and every remaining allegation contained therein.

4. Defendant admits the allegations contained in paragraph 4 of the Complaint.

5. Defendant denies that-plaintiff has been injured or damaged as alleged. Defendant lacks sufficient information or knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 5 of the Complaint, and on that basis, denies each and every remaining allegation contained in paragraph 5 of the Complaint.

6. Defendant lacks sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 6 of the Complaint, and on that basis, denies each and every allegation contained in paragraph 6 of the Complaint.

7. Defendant admits that in or about February 1987, plaintiff was hired by Bio-Rad at its Contra Costa facilities as a "process engineer" and that plaintiff remained employed by Bio-Rad until June 22, 1994. Except as so expressly admitted, defendant denies each and every remaining allegation contained in paragraph 7 of the Complaint.

8. Defendant denies each and every allegation contained in paragraph 8 of the Complaint.

8(a). Defendant admits that plaintiff did not hold the position of senior engineer while employed at Bio-Rad. Except as so expressly admitted, defendant lacks sufficient information or knowledge to form an opinion as to the truth of the remaining allegations, and on that basis, denies each and every remaining allegation contained in paragraph 8(a) of plaintiff's Complaint.

8(b). Defendant lacks sufficient information and knowledge to form an opinion as to the truth of the allegations contained in paragraph 8(b) of the Complaint, and on that basis, denies each and every allegation contained therein.

8(c). Defendant lacks sufficient information and knowledge to form an opinion as to the truth of the allegations contained in paragraph 8(c) of the Complaint, and on that basis, denies each and every allegation contained therein.

8(d). Defendant admits that in or about April 1994, plaintiff informed defendant that she intended to leave the company. Except as so expressly admitted, defendant denies each and every remaining allegation contained in paragraph 8(d) of the Complaint.

8(e). Defendant admits that on plaintiff's April 1994 Management/ Professional Performance evaluation a notation was made that stated "Charlotte should be promoted to an (sic) Sr. Engineer or equivalent position." Except as so expressly admitted, defendant denies each and every remaining allegation contained in paragraph 8(e) of the Complaint.

8(f). Defendant admits the allegations contained in paragraph 8(f) of the Complaint.

8(g). Defendant realleges and incorporates herein by reference its previously made responses to paragraphs 8(d) and 8(e) as though fully set forth herein. Except as so realleged and incorporated by reference, defendant denies each and every remaining allegation contained in paragraph 8(g) of the Complaint.

8(h). Defendant denies each and every allegation contained in paragraph 8(h) of the Complaint.

8(i). Defendant denies each and every allegation contained in paragraph 8(i) of the Complaint.

8(j). Defendant admits the allegations contained in paragraph 8(j) of the Complaint.

8(k). To the extent paragraph 8(k) contains allegations concerning privileged settlement communications protected under Federal Rule of Evidence 408 to which no answer is

required, defendant seeks to protect the privileged status of those communications, and therefore, neither admits or denies any privileged communications contained in paragraph 8(k) of the Complaint. To the extent these allegations must be answered, they are denied, and defendant further denies each and every remaining allegation contained in paragraph 8(k) of the Complaint.

8(l). Defendant admits the allegations contained in paragraph 8(l) of the Complaint.

8(m). Defendant denies each and every allegation contained in paragraph 8(m) of the Complaint.

8(n). Defendant denies each and every allegation contained in paragraph 8(n) of the Complaint.

8(o). Defendant admits that after plaintiff's departure from Bio-Rad, defendant hired a male plant engineer. Except as so expressly admitted, defendant denies each and every allegation contained in paragraph 8(o) of the Complaint.

8(p). Defendant denies each and every allegation contained in paragraph 8(p) of the Complaint.

8(q). Defendant admits that in 1996, Bio-Rad hired a male senior engineer. Except as so expressly admitted, defendant denies each and every allegation contained in paragraph 8(q) of the Complaint.

8(r). Defendant denies each and every allegation contained in paragraph 8(r) of the Complaint.

9. Defendant denies each and every allegation contained in paragraph 9 of the Complaint.

10. Defendant denies each and every allegation contained in paragraph 10 of the Complaint.

11. Defendant admits that plaintiff filed an EEOC charge against defendant on or about February 27, 1995 and that a copy of plaintiff's alleged affidavit incorporated therein is attached as

Exhibit A to the Complaint. Except as so expressly admitted, defendant denies each and every remaining allegation contained in paragraph 11 of the Complaint.

12. Defendant admits that it received a copy of a right to sue letter dated April 29, 1996 purportedly issued by the EEOC to plaintiff. The remaining allegations of paragraph 12 of the Complaint contain statements and/or conclusions of law to which no answer is required. Except as so expressly admitted, and to the extent the remaining allegations of paragraph 12 of the Complaint must be answered, defendant lacks sufficient information or knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 12 of the Complaint, and on that basis, denies each and every remaining allegation contained therein.

13. Defendant denies each and every allegation contained in paragraph 13 of the Complaint.

13(a). Defendant lacks sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 13(a) of the Complaint, and on that basis, denies each and every allegation contained therein.

13(b). Defendant lacks sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 13(b) of the Complaint, and on that basis, denies each and every allegation contained therein.

13(c). Defendant admits the allegations contained in paragraph 13(c) of the Complaint.

13(d). Defendant lacks sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 13(d) of the Complaint, and on that basis, denies each and every allegation contained therein.

13(e). Defendant lacks sufficient information or knowledge to form a belief as to the truth of the allegations

contained in paragraph 13(e) of the Complaint, and on that basis, denies each and every allegation contained therein.

13(f). Defendant denies each and every allegation contained in paragraph 13(f) of the Complaint.

13(g). Defendant admits that in a letter to the EEOC, dated May 16, 1995, defendant represented that a Senior Mechanical Engineer's title was changed to Mechanical Engineer 4 in September 1994. Except as so expressly admitted, defendant denies each and every allegation contained in paragraph 13(g) of the Complaint.

13(h). Defendant admits that in letters to the EEOC, dated March 23 and May 16, 1995, defendant represented that the title of Senior Engineer had been discontinued by the company in 1991 and, that within the chemical engineering discipline, the position title of Plant Engineer correlated to the former position title of Senior Engineer. Defendant also represented that the Plant Engineer title was the position to which plaintiff was promoted in 1994. Defendant further represented that in 1994, plaintiFs manager determined that she had satisfactorily exhibited the skills and ability for a higher level position which coincided with the company's business need for a position at a higher level and that consequently plaintiff was promoted to the position of Plant Engineer. Except as so expressly admitted, defendant denies each and every allegation contained in paragraph 13(h) of the Complaint.

13(i). Defendant lacks sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 13(i) of the Complaint, and on that basis, denies each and every allegation contained therein.

13(j). Defendant lacks sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 13(j) of the Complaint, and on that basis,

denies each and every allegation contained therein.

13(k). Defendant lacks sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 13(k) of the Complaint, and on that basis, denies each and every allegation contained therein.

13(l). Defendant denies each and every allegation contained in paragraph 13(l) of the Complaint.

14. Defendant denies each and every allegation contained in paragraph 14 of the Complaint.

15. Defendant denies each and every allegation contained in paragraph 15 of the Complaint.

16. Defendant denies each and every allegation contained in paragraph 16 of the Complaint.

17. Paragraph 17 of the Complaint contains statements and/or conclusions of law to which no answer or response is required. To the extent that paragraph 17 of the Complaint contains allegations which must be answered they are denied.

WHEREFORE, plaintiff prays for relief as hereinafter alleged.

SECOND CLAIM FOR SEX DISCRIMINATION UNLAWFUL RETALIATION FOR ENGAGING IN PROTECTED ACT IN VIOLATION OF 42 U.S.C. § 2000e-3

18. Defendant realleges and incorporates by reference its previously made Defendant denies each and every allegation contained in paragraph 15 of the responses to paragraphs 1 through 13(l), inclusive, as though fully set forth herein.

19. Defendant admits that plaintiff wrote on her April 1994 Management/ Professional Performance Evaluation that she believed that by not promoting her to a position with the title senior engineer, defendant had discriminated against her on the

basis of her gender. Except as so expressly admitted, defendant lacks sufficient information or knowledge to form an opinion as to the truth of the remaining allegations of paragraph 19 of the Complaint, and on that basis, denies each and every remaining allegation contained therein.

20. Defendant lacks sufficient information or knowledge to form an opinion as to the truth of the allegations contained in paragraph 20 of the Complaint, and on that basis, denies each and every allegation contained therein.

21. Defendant denies each and every allegation contained in paragraph 21 of the Complaint.

22. Defendant denies each and every allegation contained in paragraph 22 of the Complaint.

23. Defendant denies each and every allegation contained in paragraph 23 of the Complaint.

24. Defendant denies each and every allegation contained in paragraph 24 of the Complaint.

25. Paragraph 25 of the Complaint contains statements and/or conclusions of law to which no answer or response is required. To the extent that paragraph 25 of the Complaint contains allegations which must be answered they are denied.

THIRD CLAIM FOR TORTIOUS DISCHARGE IN VIOLATION OF PUBLIC POLICY STATED IN CALIFORNIA CONSTITUTION, ART. I, SEC 8

26. Defendant realleges and incorporates herein by reference its previously made responses to paragraphs 1 through 13(1) and paragraphs 19 through 22, inclusive, as though fully set forth herein.

27. Defendant denies each and every allegation contained in paragraph 27 of the Complaint.

28. Defendant denies each and every allegation contained in paragraph 28 of the Complaint.

28. Defendant denies each and every allegation contained in paragraph 28 of the Complaint.

29(a). Paragraph 29(a) of the Complaint contains statements and/or conclusions of law to which no answer or response is required. To the extent that paragraph 29(a) of the Complaint contains allegations which must be answered they are denied.

29(b). Paragraph 29(b) of the Complaint contains statements and/or conclusions of law to which no answer or response is required. To the extent that paragraph 29(b) of the Complaint contains allegations which must be answered they are denied.

29(c). Paragraph 29(c) of the Complaint contains statements and/or conclusions of law to which no answer or response is required. To the extent that paragraph 29(c) of the Complaint contains allegations which must be answered they are denied.

29(d). Paragraph 29(d) of the Complaint contains statements and/or conclusions of law to which no answer or response is required. To the extent that paragraph 29(d) of the Complaint contains allegations which must be answered they are denied.

29(e). Paragraph 29(e) of the Complaint contains statements and/or conclusions of law to which no answer or response is required. To the extent that paragraph 29(e) of the Complaint contains allegations which must be answered they are denied.

30. Defendant denies each and every allegation contained in paragraph 30 of the Complaint.

31. Defendant denies each and every allegation

contained in paragraph 31 of the Complaint.

FOURTH CLAIM FOR BREACH OF CONTRACT

32. Defendant realleges and incorporates herein by reference its previously made responses to paragraphs 1 through 11 and paragraphs 18 through 21, inclusive, as though fully set forth herein.

33. Defendant admits that Bio-Rad Laboratories' Code of Ethics and Standards of Conduct was distributed to Bio-Rad employees on or about February 19, 1993 ("the Code"), a copy of which is attached to the Complaint as Exhibit B. Except as expressly admitted, defendant denies each and every remaining allegation of paragraph 33 to the Complaint.

33(a). Defendant admits that the allegation contained in paragraph 34(a) of the Complaint accurately quotes the Code. Except as expressly admitted, defendant denies each and every allegation of paragraph 34(a) of the Complaint.

33(b). Defendant denies each and every allegation contained in paragraph 34(b) of the Complaint.

33(c). Defendant denies each and every allegation contained in paragraph 34(c) of the Complaint.

34. Defendant admits that a copy of Bio-Rad Laboratories' Code of Ethics and Standards of Conduct dated March 1, 1994 (the "1994 Code") was distributed to Bio-Rad employees on or about March 1, 1994. Except as so admitted, defendant denies each and every remaining allegation contained in paragraph 34 of the Complaint.

35. Defendant realleges and incorporates by reference its previously made' responses to paragraphs 33, 33a, 33b and 33c as though fully set forth herein. Except as so expressly realleged and incorporated, defendant denies each and every remaining

allegation contained in paragraph 35 of the Complaint.

36. Defendant denies each and every allegation contained in paragraph 36 of the Complaint.

37. Defendant lacks sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 37 of the Complaint, and on that basis, denies each and every allegation contained therein.

38. Defendant denies each and every allegation contained in paragraph 38 of the Complaint.

39. Defendant denies each and every allegation contained in paragraph 39 of the Complaint.

FIFTH CLAIM FOR BREACH OF CONTRACT BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

40. Defendant realleges and incorporates herein by reference its previously made responses to paragraphs 1 through 11, paragraphs 18 through 21 and paragraphs 34 through 39, inclusive, as through fully set forth herein.

41. Defendant denies each and every allegation contained in paragraph 41 of the Complaint.

42. Defendant lacks sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 42, and on that basis, denies each and every allegation contained therein.

43. Defendant denies each and every allegation contained in paragraph 43 of the Complaint.

44 . Defendant denies each and every allegation contained in paragraph 44 of the Complaint.

45. Defendant denies each and every allegation contained in paragraph 45 of the Complaint.

46. Defendant denies each and every allegation contained in paragraph 46 of the Complaint.

AFFIRMATIVE DEFENSES

FIRST DEFENSE
(Failure to State Claim)

1. The Complaint, and each cause of action contained therein, fail to state facts sufficient to constitute a claim upon which relief may be granted.

SECOND DEFENSE
(Statutes of Limitation)

2. Plaintiff's First, Second, Third, Fourth and Fifth causes of action are barred by the applicable statutes of limitation as set forth in California Code of Civil Procedure sections 337, 339, 340 and 340(3) and 42 U.S.C. § 2000e.

THIRD DEFENSE
(Scope of Administrative Remedies)

3. To the extent that the First and Second causes of action of the Complaint state claims under Title VII that exceed the scope of plaintiff's administrative charge, the cause of action is barred by her failure to exhaust her administrative remedies.

FOURTH DEFENSE
(Exclusive Remedy of Workers' Compensation Act)

4. To the extent that the Complaint, and each cause of action contained therein, seeks damages for alleged physical and/or emotional injury, plaintiff's exclusive remedy is provided by the California Workers' Compensation Act, California Labor Code section 3200 et seq.

FIFTH DEFENSE

(Causation)

5. The Complaint, and each cause of action contained therein, is barred because if plaintiff suffered any damages at all, no alleged action or omission by Bio-Rad was the actual or proximate cause of said damages.

SIXTH DEFENSE

(Waiver)

6. The Complaint, and each cause of action contained therein, is barred by the doctrine of waiver because of plaintiff's own conduct, acts, and omissions.

SEVENTH DEFENSE

(Estoppel)

7. The Complaint, and each cause of action contained therein, is barred by the doctrine of estoppel because of plaintiff's own conduct, acts, and omissions.

EIGHTH DEFENSE

(Laches)

8. The Complaint, and each cause of action contained therein, is barred by the doctrine of laches because of plaintiff's own conduct, acts, and omissions.

NINTH DEFENSE

(Unclean Hands)

9. The Complaint, and each cause of action contained therein, is barred by the doctrine of unclean hands because of plaintiff's own conduct, acts, and omissions.

TENTH DEFENSE

(Failure to Mitigate Damages)

10. The Complaint, and each cause of action contained therein, is barred by her failure to mitigate her alleged damages.

ELEVENTH DEFENSE

(Failure to State a Claim for Punitive and/or Exemplary Damages)

11. Bio-Rad alleges that plaintiff has failed to state a claim against Bio-Rad for punitive and/or exemplary damages.

TWELFTH DEFENSE

(Emotional Distress)

12. Bio-Rad alleges that any emotional distress allegedly suffered by plaintiff is not attributable to Bio-Rad or any conduct for which Bio-Rad would be liable.

THIRTEENTH DEFENSE

(After-Acquired Evidence)

13. Plaintiff's action may be barred by after-acquired evidence and/or any damages plaintiff has should be reduced as a result of such after-acquired evidence.

FOURTEENTH DEFENSE

(Unconstitutionality of Punitive Damages)

14. The Complaint, and each cause of action therein, fails to state facts sufficient to support a determination that punitive damages may be granted. In addition, plaintiff's claim for punitive damages violates the due process clauses of the 5th and 14th Amendments of the United States Constitution, as well as the California Constitution and related California statutory and common law, to the extent that the amount of such damages is

disproportional to the wrong alleged and the actual damages sought, and to the extent that neither statutory law nor common law afford Bio-Rad adequate procedural safeguards in light of the potential punishment at stake.

FIFTEENTH DEFENSE

(At-Will Employment)

15. The Fourth and Fifth causes of action of the Complaint are barred by Labor Code section 2922.

SIXTEENTH DEFENSE

(Express At-Will Agreement)

16. The Fourth and Fifth causes of action of the Complaint are barred by plaintiff's express at-will agreement.

SEVENTEENTH DEFENSE

(Lack of Consideration)

17. The Fourth and Fifth causes of action of the Complaint are barred because l there is a lack of consideration.

EIGHTEENTH DEFENSE

(Uncertainty)

18. The Complaint, and each cause of action presented therein, are vague, ambiguous and uncertain.

NINETEENTH DEFENSE

(Compliance with Statutes)

19. All conduct and activities of Bio-Rad alleged in the Complaint conformed to statutes, governmental regulations and industry standards based upon the stated knowledge existing at the time alleged in the Complaint;

WHEREFORE, Bio-Rad prays for judgment as follows:

1. That plaintiff take nothing by her Complaint;

2. That Bio-Rad be awarded its costs of suit incurred herein, including its reasonable attorneys fees;

ABA FORMAL ETHICS OPINION 94-382
July 5, 1994

Unsolicited Receipt of Privileged or Confidential Materials

A lawyer who receives on an unauthorized basis materials of an adverse party that she knows to be privileged or confidential should, upon recognizing the privileged or confidential nature of the materials, either refrain from reviewing such materials or review them only to the extent required to determine how appropriately to proceed; she should notify her adversary's lawyer that she has such materials and should either follow instructions of the adversary's lawyer with respect to the disposition of the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.

The Committee has been asked to consider the obligations of a lawyer under the Model Rules of Professional Conduct (1983, as amended) when the lawyer is offered or sent, by a person not authorized to offer them, materials of an adverse party that the lawyer knows to be, or that appear on their face to be, subject to the attorney-client privilege of an adverse party or otherwise confidential within the meaning of Model Rule 1.6.[1] The question posed addresses situations in which the lawyer has not solicited the production of such material and its production of such material and its production was not authorized by the owner of the materials. It includes situations in which the

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[[1] Footnotes at end of document.]

lawyer is offered such materials and has an opportunity to

decline them, as well as situations in which, without notice, the materials are simply sent to, and received by, the lawyer. The question embraces both situations in which the lawyer has knowledge of the privileged and/or confidential nature of the materials before receiving them and situations in which the lawyer does not recognize the confidential nature of the materials until receipt. [2]

Although the Model Rules do not offer explicit guidance on the present issue, we are persuaded by relevant public policy considerations and case law that a lawyer who, without solicitation, receives materials which are obviously privileged and/or confidential has a professional obligation to notify the adverse party's lawyer that he or she possesses such materials and either follow the instructions of the adversary's lawyer with respect to the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from the court.

1. Analogous Cases

The present issue is similar to that considered by the Standing Committee in Formal Opinion 92-368, Inadvertent Disclosure of Confidential Materials (November 10, 1992). in that case, a lawyer received materials that appeared on their face to be subject to the attorney-client privilege or otherwise confidential and it was clear that the materials were not intended to be sent to the receiving lawyer. We recognized that, in this advanced technological age with its frequent use of facsimile machines and electronic mail,such inadvertent disclosures frequently occur, and that today's beneficiary of such disclosures may likely become tomorrow's victim. We concluded that a lawyer receiving such materials had a

professional responsibility, upon realizing the error, to avoid reviewing such materials further, to notify sending counsel if he is unaware of the error, and to follow sending counsel's directions as to the handling and disposition of such confidential materials.

Our decision was influenced by the values served by principles of confidentiality and the attorney-client privilege, the law governing bailments and missent property, and general considerations of common sense, reciprocity and professional courtesy. Although we considered other competing principles—including the possible deterrent effect that allowing use of such materials might have on similar future errors, and the receiving lawyer's obligation zealously to represent the interests of her client—we concluded that these considerations were not dispositive and did not justify a rule that would allow the receiving lawyer to take advantage of such inadvertent disclosures of privileged and/or confidential materials.

The instant case is analogous. An unauthorized disclosure of privileged and/or confidential materials by anyone is, from the adverse party's perspective, no more intended and no more consensual than when disclosure occurs because of an error in transmission. We recognize, however, that from the receiving lawyer's perspective, the present situation may be somewhat distinguishable from that previously considered by the Standing Committee. in our prior opinion, the sending party did not intend to transmit the privileged and/or confidential material to the receiving lawyer. In contrast, our present question assumes that the unauthorized sender indeed intended for the receiving lawyer to receive and make use of the transmitted materials. More important, by making the disclosure, the sender may be seeking to rectify improper or unjust conduct—for example, the failure to disclose such documents in response to a production

request clearly calling for them. In such instance, although the sender has no authority to make the disclosure, the receiving lawyer may be entitled to use them. In such instance, although the sender has no authority to make the disclosure, the receiving lawyer may be entitled to use them.

A federal court recently addressed unauthorized disclosure in *In re Shell Oil Refinery*, 143 F.R.D. 105 (E.D. La. 1992) amended and reconsidered on other grounds, 1992 WL 275426 (E.D. La. Sept. 29, 1992) and (144 F.R.D. 73 9 E.D. La. Nov. 3, 1992), where a current employee of a party provided an adverse party with confidential documents belonging to his employer. The court prohibited the receiving the party from making any use of such materials.

> The Court is concerned with preserving the integrity of this judicial proceeding. What matters is balancing the scales. That can be done by prohibiting the PLC [the receiving party] from making use of the documents, requiring the PLC to identify and produce the documents to Shell, and prohibiting the PlC from any further ex parte contact with any Shell employees other than those who are plaintiffs in this suit.

143 F.R.D. at 108-109.

II. State Ethics Opinions

A number of state bar ethics committees that have confronted this issue have concluded that the receiving lawyer has no obligation to disclose to a court or an adverse party that he or she possesses the adverse party's privileged or confidential information and that the receiving lawyer may use such materials. The Maryland Bar Association has opined that:

A lawyer who receives from an unidentified source copies

> of documents belonging to an opposing party has no obligation to reveal the matter to the court or the opposing party. The lawyer should keep copies to avoid destruction of evidence; however, if the lawyer receives original documents, he must attempt to return them to the rightful owner.

Maryland Bar Ass'n, Op. 89-53.

The Virginia Bar Association has approved the use of such materials although it states that opposing counsel should be notified of their receipt as a matter of "professional courtesy."

> The [receiving] lawyer may retain, read,and make use of the material from his opponent's file that was sent to him by an unknown third party.

Virginia Bar Ass'n, Op. 1076 (1988).

The Michigan Bar Association has also weighed in on this side of the issue, stating that:

> An attorney who comes into possession of a document of the opposing party during litigation may use the document at trial provided it is admissible evidence and neither the attorney nor his client in any way procured the removal of the document from the possession of the opposing party...An attorney's mere possession of the opposing party's internal and private memorandum does not require the attorney to withdraw from his representation of his client.

Michigan Bar Ass'n, Op. CI-970 (1983).

III. Ethical Obligations.

Notwithstanding these state bar association opinions, the Committee is not convinced that a lawyer receiving such materials has no responsibilities upon receipt of such materials

or that a lawyer receiving such materials, consistent with his or her professional responsibilities as embodied in the Model Rules, may make limited use of such materials, for the reasons outlined in ABA Formal Opinion No. 92-368 and in *In re Shell*. In the Standing Committee's view, adopting such a position would place an adversary at the mercy of those who would use, on an unauthorized basis, the adversary's communications. In almost all cases a party should be able to protect its propriety interests, as in the case of confidential materials, and its privileges, as in the case of material falling within the attorney-client privilege, despite the unauthorized efforts of others to undermine or sabotage them.

At the same time, however, the Standing Committee is not convinced that the relevant standards governing a lawyer's professional responsibilities would justify an absolute rule that would prohibit a receiving lawyer from reviewing or using such materials under all circumstances. Unlike the situation that we addressed in Opinion No. 92-368, the receiving lawyer in the instant circumstances did not receive the allegedly confidential and/or proprietary materials through mere inadvertence and the receiving lawyer was not an unintended recipient of the material. In certain circumstances, the law may recognize some right to the use of the materials despite the fact that the sender had no authority to transmit them.

For example, the receiving lawyer may have a legitimate claim that the documents should have been, but were not, produced by an adverse party in response to pending discovery requests. *See In re Shell*, 1992 WL 275426 (E.D. La. Sept. 29, 1992) (ordering that such documents not be used by receiving party unless they "were the subject of a proper discovery request and were improperly withheld" by adverse parties). Or the receiving lawyer may be able to assert that the documents were

received from someone acting under the authority of a whistleblower statute. *See, e.g. Whistleblower Protection Act,* 5 U.S.C. § 1201 et seq. (1988).

An absolute rule, couched in terms of professional responsibilities, that required a receiving lawyer to return such materials could prejudice the legitimate rights of the receiving lawyer's client to employ such materials used in the prosecution or defense of a legal action. For this reason, the Standing Committee is of the opinion that a lawyer receiving such privileged or confidential materials satisfies her professional responsibilities by (a) refraining from reviewing materials which are probably privileged or confidential, andy further than is necessary to determine how appropriately to proceed, (b) notifying the adverse party or the party's lawyer that the receiving lawyer possesses such documents, (c) following the instructions of the adverse party's lawyer; or (d), in the case of a dispute, refraining from using the materials until a definitive resolution of the proper disposition of the materials is obtained from the court. [3]

The procedure suggested would afford the adverse party a reasonable and timely opportunity to resort to judicial remedies to determine legal rights and allow the receiving lawyer, under appropriate circumstances, to use relevant materials in the prosecution or defense of an action on behalf of her client. Courts confronted with similar disputes in the past have been able to protect an adverse party's legal interest adequately by granting injunctive relief restraining the disclosure or use of trade secrets and/or privileged materials, *see American Motors Corp. v. Huffstutler*, 61 Ohio St. 3d 343, 575 N.E.2d 116 (1991), by entering protective orders, or by fashioning other judicial relief.

Although the Standing Committee does not believe that the

mere unsolicited receipt of materials constitutes a violation of a lawyer's professional responsibilities, lawyers should be aware that the receipt and/or initial review of such materials, in certain circumstances, may be the basis for a motion disqualifying the lawyer from continuing to represent its client in the matter at issue.

Undoubtedly, the receipt of such materials may give rise to accusations by an adversary that the materials were, in fact, solicited by the receiving lawyer. *See Rentclub, Inc. v. Transamerica Rental Finance Corp.*, 811 F.Supp. 651 (M.D. Fla. 1992) (granting motion to disqualify counterdefendant's attorney on grounds that attorney had solicited confidential materials, and noting the "likelihood of public suspicion outweigh[ed] the social interest that will be served counsel's continued participation").

Similarly, a lawyer complying with the procedures outlined above may nonetheless be unjustly accused of reviewing the received materials before giving his or her adversary an adequate opportunity to seek appropriate protection from the courts. A court confronted with such allegations on a motion to disqualify may err on the side of caution—by granting the motion—in order to preserve inviolate the attorney-client privilege and in light of the ethical obligations of a lawyer to avoid the appearance of impropriety. For instance, in *Ackerman v. National Property Analysts, Inc.*, 1993 WL 258679 (S.D.N.Y. July 2, 1993), a district court granted a motion to disqualify plaintiff's counsel on the ground that plaintiff's counsel had improperly used confidential information obtained from former in-house counsel to defendants. The court stated that the court "must presume" that in-house counsel had disclosed confidential information to plaintiff's counsel and that because plaintiff's counsel "had taken no steps to insulate itself"

from information provided by in-house counsel, it "must not be permitted to take unfair advantage of its 'tainted' knowledge." Id., slip op. at 8. *See also MMR/Wallace Power & Indus., Inc. v. Thames Assocs.* 764 F.Supp. 712, 728 (D. Conn. 1991) (granting motion to disqualify counsel, stating that a client's right to select counsel of its choice "is outweighed by [the adverse party's] interest in a trial free from the risk that confidential information has been used against it and in the public's interest in the integrity of judicial process itself.")

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[1] "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Model Rule 1.6 comment, paragraph 5.

[2] This opinion does not address situations in which the receiving lawyer or his client was involved in procuring privileged and/or confidential materials from a former employee/ representative of an adverse party. In these situations, the Model Rules would prohibit the receiving lawyer from accepting an offer to receive, and from receiving or using such materials. That conclusion follows from Formal Opinion 91-359 and Model Rule 8.4. In ABA Formal Opinion 91-359, Contact with Former Employee of Adverse Corporate Party we warned against a lawyer's seeking privileged information from former employees of an adverse party in ex parte interviews. We stated:

> the potentially-communicating adversary attorney must be careful not to seek to induce the former employee to violate the privilege attaching to attorney client communications to the extent his or her communications as a former employee with his or her former employer's counsel are protected by the privilege (a privilege not

belonging to or for the benefit of the former employee, but the former employer)...

Model Rule 8.4 prohibits a lawyer from engaging in "conduct involving dishonesty, fraud,deceit, or misrepresentation, 'and from engaging in conduct prejudicial to the administration of justice.'" *See also* New York Bar Ass'n, Op. 89-1 (1989).

[3] There may situations under applicable state law in which it would be more appropriate for the receiving party not to notify opposing counsel in the first instance. For example, if the documents appear to disclose criminal activity likely to result in imminent death or substantial bodily harm, the lawyer may be obliged to consult with the appropriate law enforcement authority and/or the court. Similar treatment may be appropriate where the documents in question appear to reveal ongoing crime or fraud in which opposing counsel is evidently assisting, in violation of Model Rule 1.2(d).